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NOTES

ON THE

CONSTITUTIONAL HISTORY,

OF THE

UNITED STATES,

BY

KENNETH McINTOSH,

COUNSELOR-AT-LAW.

PITTSBURGH, PA.
JAMES HARRY,
1877.

Checked
May 1913

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PREFACE.

This collection of parts of lectures given before the students of Westminster College, New Wilmington, Pa., is published by request of President E. T. Jeffries, D. D.

The opinions expressed on disputed questions which arose in our history, I think, are not partisan. The student can investigate and judge for himself of their correctness.

I must express my gratitude to my honored teacher, Professor Henry W. Torrey, of Harvard College, for the interest he gave me in this study, and to the Honorable R. B. Carnahan, of Pittsburgh, for information on the practical working of our governments.

K. McIntosh.

Pittsburgh, Pa.

CHAPTER I.

COLONIAL LEGISLATION.

I.—VIRGINIA AND ITS PROVINCIAL GOVERNMENT.

During the reign of Elizabeth, Virginia was the name given to the southern part of North America. That enterprising Queen had desired the new world to be colonized, and her successor, James, proceeded to deed out to his subjects the vast unknown regions of the West. Letters patent were issued in April, 1606, to Sir Thomas Gates, Somers, Hackluyt and their associates, granting to them those territories in America lying on the sea-coast, between the thirty-fourth and forty-fifth degrees of north latitude, together with all the islands within one hundred miles of their shores.*

The patentees were required to divide themselves into two distinct companies—the one consisting of London adventurers, whose projected establishment was the first, or southern colony; the second, or northern colony, devolved on a company of merchants belonging to Plymouth and Bristol. The northern colony assumed the name of New England (1614), while the southern retained the name of Virginia.

The patentees were authorized to transport settlers to their lands, and the colonists were to enjoy the liberties and privileges of English subjects.

* Grahame's U. S. History, vol. i., p. 44.

The supreme government of the colonies was vested in a Board, resident in England, which was to be nominated by the King, and ruled by such ordinances as he might enact. A subordinate jurisdiction, chiefly executive, was given to the colonists themselves. The colonies were to have freedom of trade with foreign nations, and liberty to search for and open mines, and power to levy duties on foreign commodities. America, thus being a part of the British Empire, the colonists were permitted to enact their own local laws, under certain restrictions and qualifications.

The first legal code, or constitution, of Virginia (if a few rude measures of expediency can be dignified by being called a constitution), was carried from England, carefully sealed up in a tin box, in 1606.* They consisted of instructions from King James for the government of the colony, and were read at Point Comfort, where the box was first opened. The King therein appointed seven Councilors, with powers to elect their President, and with other defined prerogatives, which were regulated with royal wisdom and authority.

Herein was the type of what has been known as Provincial Government, to which the Colonies of Virginia, Georgia, North and South Carolinas, New Hampshire, New York and New Jersey were subject. A Governor and Council appointed by the Crown, together with a body of Representatives elected by the colonists, framed the laws and governed the colony. It was the system in which the King of England had the most power, and in which the republican spirit of America was the most thoroughly checked. As we

* Hildreth's U. S. History, vol. i., p.100.

trace the history of Virginia, its nature will be better understood.

Jamestown having been selected as the place of settlement by the founders of Virginia, the genius of John Smith rather than the instructions of the King, enabled the colony to survive. Not laws, but men, were needed. Had Sir Walter Raleigh, like Smith, given his personal efforts to the colonization of Virginia, instead of merely sending out ships for that purpose, he might have been justly styled the Founder of Virginia. Raleigh's career as a courtier and politician at the court of Elizabeth, as well as his misfortunes in the reign of James, compelled him to abandon his efforts at the colonization of the new world. When Jamestown was founded, and Smith was struggling amid the hardships of infant colonization, Raleigh was in the Tower, sighing to explore the fabulous Empire of the West.

The London Company of Merchants, who were defraying the chief expenses of the Virginia colony, did not find it a mine of wealth. However, a new charter was granted to them three years after the founding of Jamestown, May, 1609.*

By this charter, the stockholders of the company were to choose its Councilors and Treasurer, who was to be the chief executive of the Company. The patentees, consisting of Peers (31), Knights (98), Doctors, Gentlemen, Merchants and citizens to great number, now received from the King a territory 400 miles wide, extending from the Atlantic to the Pacific Ocean, Point Comfort being on the dividing line run-

* Hildreth, vol. i., p. 108.

ning east and west. This company, with its ample domain, now proceeded to reconstruct the local government at Jamestown.* The offices of president and council in Virginia were abolished, a new council was established in England, and the company empowered to fill all future vacancies in the council by election; and to this council was committed the power to remodel the magistracy of the colony, of enacting all the laws that were to have place in it, and of nominating the officers by whom the laws were to be executed. The London company appointed a Governor of Virginia for life, who had the sole superintendence of local affairs. The company was also empowered to make laws for the colony, conformable to the laws of England, "as near as might be"—a fundamental principle of colonial legislation. Even under this system of foreign rule, it was stipulated on behalf of the colonists and their posterity, that they should retain all the rights of Englishmen. It was a phrase that sounded well, even if the colony were ruled like a camp.

Under the new system, Lord Delaware was appointed to rule the colony. His deputy proclaimed the new order of things in Virginia, but the skill and resolution of Captain Smith, saved the feeble colony from the legitimate results of bad government. Sir Thomas Dale acted as dictator in the colony. Rigorous laws, devised in England, and proclaimed by the Governor, were used to bring order and harmony to the affairs of Virginia, now so unprofitable to the London stockholders.

* Grahame, vol. i., p. 57.

Before the appointment of Yeardley to be Governor, January, 1619,* the company had re-established a local council to check the tyranny of Governor Argall.

In 1619, Governor Yeardley called the first Virginia Assembly. It consisted of the Governor, Council and deputies, called Burgesses, from the eleven plantations. In 1621, the privileges of a General Assembly, to consist of a Governor, Council and House of Burgesses, were confirmed to the colony by the London company, and a constitutional frame of government, modeled after that of England, was granted to Virginia.† For the enactment of local laws, the Governor and Council appointed by the company were to be joined by delegates chosen by the people. For the passage of a law, the separate assent of the Governor, Council and Assembled Burgesses was required. The company in England had a veto on the laws, and sat as a court of appeal from the General Assembly in Virginia, which, in addition to its legislative powers, was the highest judicial court in the colony.

Colonial legislation compelled attendance upon the services of the English Episcopal Church, and made the people contribute toward its support. The Governor could lay no tax except by authority of the Assembly, and the concurrence of the Council was necessary before a levy of men for the public service could be made. The commanders of plantations were judicial officers, as well as executive. The prices of

* Hildreth, vol. i., p. 117.

† Hildreth, vol. i., p. 123.

commodities were fixed by proclamations, except that of corn, which was left free, in order to encourage its growth. Taxes were paid in grain and tobacco, while police regulations were made, one of which was that at the beginning of July the inhabitants of every plantation were to fall upon "their adjoining salvages as they did last year." The laws of England, which were held to be in force in all the colonies, as far as they were applicable to the circumstances of the people, regulated the rights of property, personal rights, and the punishment of most crimes.* The General Assembly did not claim to be able to bind Englishmen on such important subjects. Laws enacted by the Assembly had no force till ratified in a general court of the London company in England and returned under their common seal.† The reign of the company was not permitted to continue. In 1624, the link that separated the colony from the King was broken by the writ of *quo warranto*, which swept away the charter of the company, and placed Virginia in the hands of the Stewart Kings. Eighteen years afterwards the Assembly of Virginia declared to the King that his government over them had been comparatively happy, while that of the company had been intolerable, abounding in "monopolizers, contractors and pre-emptors incessant."

In England, the Revolution came and Virginia continued true to the Stewart Kings. The cannons of the English Commonwealth forced upon the colony a popular form of government. Cromwell and his

* Hildreth, vol. i., p. 134.

† Jefferson's Notes on Va.

adherents were popular in New England; but the cavalier emigrants, who predominated in Virginia, were hostile to the Commonwealth. The Puritans of New England hailed with joy the expulsion of the Stewarts. Virginia, like the royal house itself, had to be met and conquered. "The Virginia cavaliers conceived a violent antipathy against all the doctrines, sentiments and practices that were reckoned peculiar to the Puritans." *

During the English Commonwealth, important changes were made in the government of Virginia. Taxation, the erection of forts, and the maintenance of an army, were to be only by the consent of the Virginia Assembly. The suffrage was extended to all tax-payers, and the Assembly elected the Governor, Councilors and other chief officers.†

With the restoration of Charles II., however, the suffrage was again restricted, and the government passed into the hands of the King and wealthy planters. The system of plantations in Virginia, differed from the town system of New England. The former was allied to the aristocratic system of English estates, the latter fostered a spirit of local independence, and a consciousness of the interest of each in the welfare of the entire colony. The Puritans passed laws for their entire people, and knew, at times, how to be intolerant, narrow, cruel and selfish; the planters of Virginia, too, after the restoration, legislated in the interest of the dominant party. Harsh laws were enacted against the Quakers and all others

* Grahame, vol. i., p. 89.
† Hildreth, vol. i., p. 509.

who refused to attend the parish churches. The Restoration of Charles II. was made a holiday and the Church of England was hedged about by the most partial laws (1662). The Governor and sixteen Councilors held from the restored King a commission of oyer and terminer, and judged civil causes above £15. The Assembly was still the highest court of appeal. In 1671, Governor Berkeley thanked God there were no free schools nor printing in Virginia, for "learning," said he, "has brought disobedience and heresy and sects into the world, and printing has divulged them and libels against the best government." * The friends of prerogative had formed a government in accord with this notion of popular education. In the provincial manner, the King appointed the Governor and Council, and † the Governor appointed eight Commissioners in each county, who had the power of justices of the peace, levied taxes, and enacted local laws. They held their powers at the will of the Governor, or for life. By such means, did the wealthy planters and the friends of royalty rule Virginia. The Assembly continued in office for an indefinite number of years, from 1661 to 1675, and enacted that none but householders and freeholders should have a voice in the election of Burgesses. The General Assembly, which was composed of the Council and the Burgesses sitting in one house, was divided into two houses, and the Council was given a negative on the laws. Appeals lay from the Supreme Court to the King and Council in England.

* Hildreth, vol. i., p. 526.

† Hildreth, vol. i., p. 516.

Trade with foreigners was suppressed and the State was stripped of her territory.*

In 1676, Bacon's Rebellion was the indignant uprising of the people against aristocratic violence and extortion. Bacon's laws, for a time, restored popular government, but the triumph of Governor Berkeley brought back arbitrary government. (1677.)

From among the wealthy planters, were chosen the Council, Assembly, justices and other officers of government. Financial prosperity gave contentment to the poorer classes, and the oligarchy that ruled the colony were satisfied with the extensive powers granted to them.

In 1705, finding out that other colonies enjoyed greater privileges than they enjoyed, "they began," says Surveyor General Quarry, "to imbibe the malignant humor of the charter colonies." Hostility to British taxation, began to sow the seeds of independent self-government, and the agents of the King of England began to find trouble. The Governor of Virginia, from the reign of Queen Anne to the Revolution, a period of 63 years, † drew his pay in England, while the duties of his office were performed by his deputy, who received two-fifths of the salary (£800) for his services. Thus, in the provincial governments as well as the proprietary, the Governor's deputy ruled the colony.

Deputy Governor Mott effected the fifth revision of the Virginia code of laws, in 1705. Slavery was now regulated and protected. Each county was given two

* Jefferson's Notes on Va., p. 358.

† Hildreth, vol. ii., p. 235.

Burgesses, to be elected by the freeholders, and the possession of large tracts of land in the hands of individuals encouraged. * Three hundred pounds (£300) of quit-rents, together with the duty from exports of tobacco to the extent of £4,000, were applied to support the civil list.

In 1718, however, the Assembly declared that its consent was necessary for their taxation by Parliament. †

The sixth and last revision of the colonial laws of Virginia took place in 1749. ‡ The King having made a free use of his veto power, the Assembly in an address to him expounded the principles of colonial legislation as it knew them. "When a law enacted here hath once received your Majesty's approbation, * * the same cannot by the legislature here be revised, altered, or amended without your Majesty's permission." Thus the laws approved by the King had a more fixed and fundamental position than the mere local legislative enactments which might yet be vetoed by him.

The progress of the spirit of independence was slow in Virginia since the power of the crown was surrounded by so many bulwarks. Its provincial form of government, its wealthy planters who clung to aristocratic forms and customs, its poor whites, dependant on the rich, and slaves submissive to their masters, its established church and its hostility to Puritanism, made its government cling to the mother country.

* Hildreth, vol. ii., p. 240.
† Hildreth, vol. ii., p 327.
‡ Hildreth, vol. ii., p. 414.

The petition of the Council and Burgesses of Virginia to the King, their memorials to the Lords and remonstrances to the Commons in the year 1764, began the Revolutionary contest in Virginia. The Stamp Act was followed by the resolutions of the House of Burgesses of 1765, which declared the independence of Virginia of Parliament in matters of taxation. For eleven years the people of Virginia were agitated by the colonial dispute with Great Britian, and finally joined in the war for Independence. *

When the Assembly cried "Treason!!" in response to Patrick Henry's eloquent appeal in favor of armed opposition to the King, it was the clashing of the conservative cavalier element with the pent up indignation of one who rose from the people and who knew and felt the wrongs of a long-outraged and down-trodden community. The reaction placed Virginia in the front of Revolutionary affairs, and in wealth and population she excelled every other colony.

In 1776, upon the recommendation of the Continental Congress, Virginia, like most of the other States, established a new constitution or ordinance of government in harmony with the systems of popular government about to succeed colonial English rule. Jefferson † names the ordinance framed in Virginia the first constitution which was formed in the United States. It was so skillfully framed that it was not found necessary to change it until 1830. This indicates the growth Virginia had made in Republicanism, during the years just before the Revolution.

* Jefferson's Notes on Va., p. 416.
† Notes on Va., p. 360 of vol. viii. of his Works.

The Presbyterians led in an attack on the Anglican Church, and demanded the civil equality of every denomination of Christians. Madison is said to have imbibed his belief in the freedom of the conscience in matters of religion from the Presbyterian, Witherspoon. The Quakers, too, and other sects that sprung from the people, aided by Jefferson and the most liberal of the Episcopalians, united to secure religious equality before the law.* Here, then, rose one article in the Virginia Bill of Rights. It prevented a repetition of a dark page in her history.†

Several acts of the Virginia Assembly of 1659, 1662 and 1693 had made it penal in parents to refuse to have their children baptized; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the State; had ordered those already here, and such as should come thereafter, to be imprisoned till they should abjure the country; provided a milder punishment for their first and second return, but death for their third; had inhibited all persons from suffering their meetings in or near their houses, entertaining them individually or disposing of books which supported their tenets. The Anglicans ruled for a century, but the constitution of 1776 placed them on a level with other sects.

This first popular Virginia government consisted of a Governor, Council, two legislative houses, and a judiciary appointed by the legislature, as were also the executive officers of the State. To insure the dignity

* Bancroft, vol. ix., chap. 15.

† Jefferson's Notes on Va.

and fixedness of the senatorial body, Virginia, like New York and Delaware, gave it permanence by renewing, the first two, one-fourth, Delaware, one-third of its members annually. Thus the senators held office for four years.

* The provincial convention, elected in April, 1776, to continue in office one year, met at the capitol, Williamsburg, on May 6th. On the 29th of June it set in operation the new constitution without any further consultation of the people. Thus did this revolutionary assembly carry on the work of governing the people in the place of the old government. It also enacted legislative reforms of vital importance. In 1705, Virginia passed laws to strengthen the aristocratic system of entails, and in 1727 slaves were permitted to be attached to the soil and entailed with it. On the 12th of October, 1776, Jefferson obtained leave of this legislative convention to bring in a bill for the abolition of entails. By this bill, all donees in tail were vested with the absolute dominion of the property entailed. This step toward a more free distribution of property was followed by making the lands of an intestate divisible by law equally among his representatives, which also was the work of Jefferson.

Great names in the history of Virginia, not only adorned that State and gave her good government, but also shed lustre on national jurisprudence. Washington, Jefferson, Madison, Marshall—names that will grow brighter while men continue to adore the justice, stability and perpetuity of our government, state and national.

* Jameson's Convention, §138.

CHAPTER II.

COLONIAL LEGISLATION.

II.—PENNSYLVANIA AND ITS PROPRIETARY FORM OF GOVERNMENT.

The constitutional history of Pennsylvania down to the year 1790, when its fundamental law assumed its present character, is interesting and instructive. Next in importance after the charter governments of Massachusetts, Rhode Island and Connecticut, comes the Proprietary governments of Pennsylvania, Maryland and Delaware. In the former, the people looked for liberty as guaranteed in their charters; in the latter, the people depended upon the liberality and generosity of the Penns and the Baltimores for political and religious freedom, and it proved to be a dependence not in vain, but so amply repaid that posterity is proud of those eminent proprietors.

In 1682, William Penn landed in Chester, and secured, for the government of his province, the adoption of the constitution which he and Algernon Sydney, and other friends of Penn, had drawn up in England. William Penn was a man of strong sentiments and fixed opinions. He had suffered imprisonment and persecution for his religious belief, and in America he determined to found a State where persecution for opinion's sake should be unknown.

Charles II. paid a debt of £15,000, which he owed Penn, on account of money loaned and services rendered to England by Sir William, the father of William Penn, by deeding to the distinguished Quaker the Province of Pennsylvania. Penn, by deed from James II., then Duke of York, of the date of August 24, 1682, secured a fee simple in the land, and by charter from Charles II., dated March 4, 1680, secured for himself, his heirs and assigns, the office of Governor, with almost the powers of an absolute monarch. By self-sacrifice and devotion to principle, Penn strove to found a free government, but brought upon himself wretchedness and poverty.

The constitution drawn up by Penn in England lasted but a year, when delegates from various parts of the province, by powers granted to them by law, remodeled it.

The Council, which consisted of twelve from each of the six counties of the province, was changed to three from each county—one to be elected by the county each year to serve for three years. The Governor or his deputy presided in the Council, and had a "treble voice;" but in 1683, his powers were defined so that he could perform no public act of state that might relate to the justice, trade, treasury or safety of the province, but by and with the advice and consent of the Council.

The Governor and Council proposed and executed all laws. The General Assembly had only power to concur or reject.

By Penn's constitution, the Council was to be divided into committees to manage the general affairs

of the province, but in 1683, the provision was substituted that one-third of the Council, with the Governor, should have the management of public affairs relating to the peace, justice, treasury, education and sobriety of the province.

The General Assembly was to consist of two hundred members and to be elected yearly, but in 1683 the number was reduced to thirty-six, and in 1696 to twenty-four persons; yet Penn, in his theoretical constitution, had provided that the first year the General Assembly should consist of all the freemen of the province, and "that the number two hundred should be enlarged as the country should increase in people."

Even in 1683, the provision was made that seventy-two in Council and two hundred in the Assembly were to be the highest number of legislators.

Sheriffs, justices of the peace and coroners were appointed yearly by the Governor, but the terms of services of judges, treasurers and masters of the rolls, were changed from a yearly to the duration of good behavior. The appointment of all such officers was with the Governor, upon the recommendation of Council or Assembly.

The Assembly impeached, but the Council tried impeachments, and it was provided that the consent of the Governor, his heirs or assigns, and six-sevenths of the Council and Assembly, alone could alter or diminish the effect of the constitution, contrary to its true intent.

In 1683, aliens received the privilege of naturalized citizens in regard to the transmission of their

property, and Penn granted to all inhabitants of the province liberty to "foul and hunt upon the lands they hold, and in all other lands not inclosed, and to fish in all rivers," and assured to all the possession of lands which they held by any legal or equitable title—saving such rents as are due.

In 1696, some additional provisions were placed in the constitution, such as declaring the legislative bodies the sole judges of the elections of their respective members, limiting the ballot to citizens of two years' residence and of £50 clear estate, punishing bribery at elections, and fixing the pay of legislators; but the the constitution of 1683 was essentially the fundamental law of Pennsylvania till 1776.

In 1701, William Penn grants to his people a new charter of privileges, which the Assembly thankfully received from their Proprietor and Governor. In it, Penn speaks of how he is now pleased to restore to the people the constitution, which the Assembly, the year before, by six parts out of seven, was pleased to surrender to him, as not fit for the government of Pennsylvania, and he now grants "liberties, franchises and privileges."

Freedom of conscience in religion is guaranteed to all who believe in one Almighty God, and all persons could serve the government in any capacity, if they professed a belief in Christ as the Saviour of the world. Criminals were allowed witnesses and counsel for their defense, and disputes about property were to be determined in court, and not in Council before the Governor. The property of one who had committed suicide, was made to descend as did that of one dying

a natural death, nor was a forfeiture to the Governor to occur upon the death of one by misfortune or accident. Youth were to be instructed at low prices, education having been esteemed of less value by the Quakers than by the people of Massachusetts, who required a system of universal education.*

Penn, for himself, his heirs and assigns, solemnly declared that neither he, his heirs or assigns, should procure or do anything whereby the liberties of the charter should be infringed. In accordance with his religious and political convictions, and to procure emigrants to Pennsylvania, its Governor strove to make it free and attractive.

In theory, the government of Pennsylvania was a constitutional monarchy, in which the Penns, their heirs and successors, represented the British sovereign and enjoyed his prerogatives, as far as the circumstances of the country and the dispositions of its inhabitants would permit. A people who were poor, and who had to struggle with the obstacles of a new country, did not lavish money upon even popular rulers, and the democratic spirit of American immigrants held government to be for the good of the governed. The Penn family was often in want, even with its vast domain and possessions.

The Proprietary government ended with the adoption of the constitution of 1776. Its power ended before that time. The revolt of the colony swept away all power eminating from the British Throne, and the people became Sovereigns. Nor was the conflict which ended in the independence of Pennsylvania of

*Bancroft, ix., p. 270.

short duration. The Proprietor, or his deputy, and his Council, formed one party, and the Assembly, representing the people, formed another. A perpetual strife existed between these parties; the King on one side and the people on the other. The Proprietor had an absolute veto upon all legislation, almost every executive and judicial officer was the instrument of his creation, every freeholder his tenant; a rental from the quit-rents formed a revenue for his deputies, which made them independent of the Assembly; and he had millions of acres to dispose of as his interest or ambition might suggest.

The Assembly, on the other hand, strove to get the disposition of the public revenues into its own hands or into the hands of officers of its own appointment. Such were the two parties of colonial history—the people on one side, the King on the other, and when the final conflict came, the Declaration of Independance consummated the rule of the people.

The Revolution also put an end to the reign of the Baltimores in Maryland, but their Proprietaryship dated back to 1632. For more than one hundred years, the family founded by George Calvert dictated the laws and policy of Maryland. The home for the persecuted Catholics of Europe, Maryland, to-day enjoys the envious distinction of having afforded a refuge to the persecuted, long before Protestants had adopted the political doctrine of entire toleration of every religious belief.

The Baltimores had to contend against the religious hostility of their Protestant population, which rose at times to bloodshed and revolution; and upon the acces-

sion of William and Mary, the Proprietaryship, with all its emoluments for twenty-six years, was taken from them.

With the restoration of the fourth Lord Baltimore (1714) the Proprietary government continued down to the Revolution. As in Pennsylvania, the deputy of the Proprietor often governed the province, and the people complained of the absence of the ruler. Liberal, generous, able and competent, the Baltimores, advanced the interests of Maryland, as well as their own fortunes and renown.

The Carolinas were also for sixty-six years (1663–1729) subject to Proprietary government. Named after Charles II., who deeded them to a number of eminent men, they proved to be of little profit to their Proprietors, either by way of rents or offices; and in hope that the turbulent subjects of the Lords Proprietors would yield a more submissive obedience to George First, the Lords, except Granville, sold their interests in those two colonies to the King.*

For twenty-four years (1669–1693) the Proprietors put in operation the "Fundamental Constitutions of Carolina," drawn up by the philosopher, John Locke. Magnificent in design and labored in detail, it was one of those Eutopian schemes of government which seem wise in theory, but in practice fail to accomplish the good which is attained by adapting reforms as they are demanded by the growth of civilization and culture.

Upon the failure of Proprietary government in Carolina, the territory was divided into two States,

* John H. Wheeler's History of North Carolina, p. 41.

the Santee river being the dividing line. The two colonies were then ruled by the Provincial form of government down to the time of the Revolution.

On May 15, 1776, the Continental Congress recommended to the assemblies and conventions of the United Colonies where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general, recommending also the total suppression of all authority under the King of Great Britain. In two months, Pennsylvania had a convention elected to form a new constitution on the authority of the people only—a convention in which Franklin presided, and which, based upon revolutionary principles, took the government of the province into its own hands. It had been chosen by recommendation of a conference of deputies from various parts of the province, who met upon the request of friends of the Revolution. This self-constituted conference enlarged the number of electors and prescribed an oath of allegiance to the new government to be taken by all who were to be members of the new body politic, and thus in effect disfranchised the Quakers, who were averse to taking an oath.

On the 24th of June, 1776, this provincial convention or conference declared its willingness to concur in a vote of Congress declaring the United Colonies free and independent States. On the 28th of September following, the new Constitution went into operation.

The reaction against British rule drove the people to the opposite extreme in favor of popular government, and the supreme legislative power was vested in a single House of Representatives of the freemen of the State. Laws were to be enacted by the authority of the General Assembly alone. The executive power was vested in a President and Council, who appointed judges and executive officers and tried impeachments. Delegates to represent the State in Congress were elected by the General Assembly, and even the President and Vice President of the Commonwealth were to be elected out of the Council by a joint ballot of the twelve Councilmen and the General Assembly.

The Bill of Rights was made the first article of the Constitution, and consisted of sixteen sections, wherein are laid down the fundamental principles of popular government.

The last section of the Pennsylvania constitution of 1776 provided for the election every seven years of a Council of Censors "to inquire whether the Constitution has been preserved inviolate in every part and whether the legislative and executive branches of government have performed their duty, or assumed to themselves, or exercised other or greater powers than they are entitled to by the Constitution." Two-thirds of the Censors concurring, they could call a convention to amend the Constitution.

Thus, the attempt to change the Constitution could be made only once in seven years, which was contrary to the prevailing spirit of the times and the progressive disposition of the American people. In all the con-

stitutions of the States, the people strove to retain what they deemed of value in English law and policy, but ever left the way open for improvement. The people refused to sleep for seven years, and the provision for a Council of Censors was swept away. The Censors did meet in 1783 and 1784, but their proceedings were inharmonious and abortive, except that their debates exposed the illegal proceedings of the badly constituted government that preceded that of 1790.

When Pennsylvania came to form its second constitution, the Federal Constitution had been formed, the science of popular government had been more thoroughly explored. Franklin's favorite notion of a single legislative body had lost favor and the proper structure for our State governments had become better realized.

The custom, too, by which the State constitutions are properly formed, has now become almost a settled law.* The organized government provides by law for a vote of the people for or against a convention to form a new constitution. If the vote is in favor of a convention, then the people, by a law made for that purpose, vote for delegates to a convention to form a constitution. The constitution formed, is submitted to a popular vote, and if ratified by the people, becomes, on a fixed day, the new fundamental law of the State. In Pennsylvania, the method of adopting the constitution of 1790 was peculiar. The convention took upon itself to say how it should proceed. It "resolved, that in the opinion of this house, a con-

* Jameson's Constitutional Convention.

vention being chosen and met, it would be expedient, just, and reasonable, that the convention should publish their amendments and alterations for the consideration of the people, and adjourn at least four months previous to confirmation." The convention made itself the people instead of following a law laid down by the government. The convention formed the Constitution and after an adjournment of a few months, assembled, and, amid the firing of guns and the ringing of bells, proclaimed the adoption of their Constitution. The people acquiesced, and thus made it law. Subsequent changes (1837 and 1873) have improved and adorned the structure, as time and statesmanship have indicated the need of reform.

CHAPTER III.

COLONIAL CHARTERS.

III. – MASSACHUSETTS, AND CHARTER GOVERNMENTS IN THE COLONIES.

The colonization of America was attended with so many perils and hardships that it was attempted only upon the most flattering inducements, or as one of two deplorable evils—upon the prospects of empire or as a refuge from the religious persecutions of Europe.

With the Reformation and the Revival of Letters, came independence of religious belief and the political doctrine that government is for the benefit of the governed, which were met by intolerant laws and the doctrine of the divine right of Kings. America afforded a refuge for every one who held an opinion that was unpopular in Europe.

The Quakers in Pennsylvania were foremost in favor of toleration, and indulged all religious views as long as men "confessed one God to be the Creator, upholder and ruler of the world, and that hold themselves obliged in conscience to live peaceably and justly in civil society." The Puritans in New England tolerated only the religious opinions of their own sect; yet they themselves were free from foreign interference in their own worship.

Our colonial history tells of progress both in civil and religious liberty.

On the fourth of March, 1629, Charles I. granted to "the Governor and Company of the Massachusetts Bay, in New England," a charter, which continued for fifty-five years to govern the greatest of the New England colonies. It confirmed to the corporators the ownership of the land which now forms the greater part of Massachusetts; it empowered them and their successors and associates forever to elect annually a Gorvenor and eighteen Assistants, and to make laws and ordinances not repugnant to the laws of England. It authorized the Company to admit new partners, to transport settlers, to encounter and repel enemies, and to constitute inferior officers as they should think proper for the ordering and managing of their affairs.† *

This was a grant of the power of local self-government to the people of Massachusetts, and to preserve that power was the cardinal principle of Massachusetts politics for one hundred and sixty years.

The structure of the government of Massachusetts Bay did not continue as marked out in the charter of 1629. At first, the Legislature consisted of one body, known as the General Court, which also acted as a supreme judicial court. In 1636, a dispute arose between two persons about the ownership of a sow. The litigation that followed developed parties in the State, until in 1644 the Legislative body was divided into two chambers, consisting of Magistrates and Depu-

† Hildreth, vol. ii., p. 68.

* Palfrey's N. England, vol. i., p. 98.

ties,* each having a veto against the vote of the other. Thus was a check found upon popular passion, and a permanent division made of the Legislative body.

The Governor and Company of Massachusetts Bay had the power to exclude all persons from their territory whose views upon any question did not meet their approval, and often was that power exercised. The freemen, who were the original governing body by the charter, determined that citizenship and the franchise should belong only to Christian men who were members of some of the churches in the colony. Nor could a church be established without permission from the civil power and the majority of existing churches.†

‡ The next step in the body politic above the freeman was the town. The freemen of the towns chose Deputies to the General Court or Legislature, elected their own local officers, and made ordinances not repugnant to the laws of the General Court. In all New England to-day, while the suffrage is nearly universal, the towns still form the unit of their geographical and political system. With small variations, the local government of towns by the people thereof, as born in Massachusetts Bay, has pervaded nearly every State in the Union.

King Charles, after signing the charter of 1629, attempted to govern England without the aid of Parliament, and also to take from the colonies their power of local self-government. A Commission was named to

* Palfrey's N. England, vol. i., p. 258.

† Palfrey, vol. i, p. 173.

‡ Palfrey, p. 274.

rule America. The people, in council at Boston, decided to resist the usurpation; but Charles found that matters of greater importance, at home, demanded his attention, so the people continued to enjoy their charter through his reign.

Up to 1640, Massachusetts had no code of written law. The powers of government were vested in the Governor, Assistants and the General Court, which consisted of the Deputies from the towns and the Magistrates,* who in turn consisted of Governor, Deputy Governor and Assistants. When the General Court was not in session, the Magistrates were the supreme government or standing council of the Commonwealth.† Each freeman belonged to some town, and by his Deputy shared in the measures of expediency which they called laws. With the growth of the colony the demand for definite and well known laws called for a written code, and the authorities, who had been accustomed to rule as their whims dictated, were forced to recognize the laws of England to be in force in the colony, as far as they were consistent with its circumstances.

Nathaniel Ward, of Ipswick, in 1641, drafted a code of laws styled, "The Body of Liberties," which the General Court adopted. Ward, who had been bred a lawyer and a divine, began his code by a Bill of Rights, made the number of capital offences only ten, and sustained the death penalty by references to scripture. Attempts were made in all the New England colonies to regulate by law the prices of commodities

* Palfrey, vol. i., p. 118.
† Palfrey, vol. i., p. 318.

and of labor, and men were forced to support the ministrations of religion and personally to attend upon them.*

Down to the year 1686, all the charter governments of New England were very similar to that of Massachusetts. Elections of officers were held annually, the towns were governed by their own local magistrates and were represented by deputies in a General Court or Legislature, suffrage was restricted to a chosen few, but taxes were imposed upon all who had property. The whole of New England was laid off into towns, which were bodies politic, managing their own local affairs. The local officers usually consisted of a Board of Selectmen, a Clerk, a Treasurer, a Sealer of Weights and Measures, Surveyors and Tithingmen, all of whom were elected by the freemen.

The highest judicial and legislative body in Massachusetts was the General Court. Not until 1692, when Massachusetts received a new charter from William and Mary, was the Judicial power separated from the Legislative. The General Court alone possessed the pardoning power. Appeals lay from the Town Courts to the Inferior Courts, which consisted of five judges, and had jurisdiction in civil causes in the sum of £10, and in criminal causes, not concerning life, member or banishment.† Appeal then lay to the Court of Assistants, and from this to the General Court. There was no recognized method of appeal to any authority beyond the sea.

In all the colonies of New England, the Assistants, or

* Palfrey, vol. i., p. 283.

† Palfrey, vol. i., p. 277.

Magistrates, were also Justices of the Peace, and professional lawyers were not to be found. New Haven, which previous to 1662 was not a part of Connecticut, was guided in its government by the teachings of the Old Testament, and found no place for jury trials. In 1664, Charles II. began a system of interference in the affairs of the New England colonies, which continued in various forms by the mother country for more than a century. At first, Commissioners were sent out in the interest of the King, "to lead and dispose the people to desire to renew their charters, and to make such alterations as should appear necessary for their own benefit." *

The Commissioners found little difficulty, except in Massachusetts, in disposing the colonies to submit to laws contrary to what they had enacted for themselves. When attempting to act in Massachusetts, they were held as usurpers of authority which the charter of Massachusetts conferred upon the people thereof. Royalty never did consider Massachusetts devoted to the principles of arbitrary government.

On the twenty-third of October, 1684, the Court of Chancery of England declared the charter of Massachusetts forfeited. The main charges upon which this judgment was founded were that the colony had presumed to coin money, had not enforced the Act of Navigation, had passed laws contrary to those of England, and had purchased the Province of Maine from Gorges while Charles II. was negotiating for it. The dispute had lasted for many years, and as far back as 1678, the General Court, in an address to the King,

* Palfrey, vol. ii., p. 61.

said: * "The laws of England are bounded within the four seas, and do not reach America. The subjects of his Majesty here being not represented in Parliament, so we have not looked at ourselves to be impeded in our trade by them, nor yet we abated in out relative allegiance to his Majesty. Laws repugnant to the laws of England they were willing to repeal with all convenient speed—except such as the repealing whereof would make them to renounce the professed cause of their first coming." Thus, nearly a century before the Declaration of Independence, the people of Massachusetts maintained their rights of local self-government, and denied the absolute power of Parliament.

With the abrogation of the charter, every right, privilege and immunity which had been founded on it, was swept away. Massachusetts was a conquered province, in which "His Majesty's Lieutenant and Governor-General" was made the sole ruler, with no power to restrain him but the King.

Upon the accession of James II., in February, 1685, a Commission was formed to govern New England, consisting of a President, Deputy President and sixteen Councilors, whose authority was to extend over Massachusetts, New Hampshire, Maine and King's Province, which lay between Rhode Island and Connecticut. No Assembly was provided for, and the powers of this new government were only executive and judicial. Soon Sir Edmond Andros was sent over to govern New England, and empowered to make laws with the consent of his Council, which were to

* Palfrey, vol. ii., p. 224.

conform to the laws of England, and to be sent to England for the royal sanction.

New England, as a royal province under Andros, was an anomaly in American history. For nearly three years arbitrary power reigned; a ruler, unrestrained by law; land titles declared void, and estates given away, as the caprice of the tyrant dictated; taxes imposed by order of the satrap of King James II., and personal liberty held only by permission of the Governor.

Upon the accession of William and Mary, the charter governments were revived. By the labors of Increase Mather and others, a new charter for Massachusetts Bay was granted, giving the King power to appoint a Governor, Lieutenant-Governor and Secretary, and making other important changes in the government.* The Legislature, or General Court, now consisted of a House of Representatives, chosen by the towns, and a Council of twenty-eight members, chosen by the General Court, but subject to the Governor's rejection. Plymouth colony and Maine were now annexed to Massachusetts, and given representatives in the General Court. The Governor had a veto on bills, and even three years after his approval, the King might annul the laws. The Governor was commander-in-chief of the militia, and appointed military officers. With the consent of the Council, he appointed judges and all officers connected with the courts.†

Courts of Admiralty were constituted by the Crown to look after the execution of acts in reference to Brit-

* Palfrey, vol. iii., p. 67.

† Palfrey, vol. iii., p. 72.

ish commerce, and Probate Courts were established by the Governor in Council. Instead of a committee of the Privy Council, "The Lords' Commissioners for Trade and Plantations" now constituted the power behind the throne, to dictate the commercial policy of England toward the colonies. The colonial Governers were now required to swear that they would use their utmost diligence to make the navigation or commercial laws effective. Parliament even struck at American manufactures, by forbidding their exportation out of the province. The power to rule commerce being secured to England, the other powers of government were held chiefly by the General Court.

By this Charter of William and Mary the qualifications of voters were changed from a basis of church membership to one of property, liberty of worship was secured to all Protestants, and in some civil causes appeals might be made to the King in Council. Such was the government of Massachusetts from the English Revolution down to the American—nearly ninety years.

The General Court consisted of a house of Representatives and twenty-eight Councilors, who sat in a separate chamber, except when officers were nominated in joint ballot. It alone had the power to levy taxes; yet the power of the crown was, in many particulars, greater than it had been under the old charter. While the Representatives were elected by the towns, the Councilors were nominated yearly by the two houses in joint session and approved by the Governor. Thus the friends of prerogative were found in the upper house. The power of the execu-

tive to dissolve the General Court before the expiration of the official year, was a royal prerogative very different from any possessed by the Governors elected under the old charter.

A conflict arose between the lower house, or the Duputies, and Joseph Dudley, the Governor appointed by Queen Anne, in which the Governor demanded, in vain, of the Legislature to settle upon his office a fixed salary. Subsequent Governors also failed to secure for themselves and other high officials appointed by the Crown, a fixed salary, but were compelled to depend for compensation upon the good will of the taxing power.

The House of Representatives came in conflict with the Governor and Council upon many questions. While the Governor had a veto upon the laws, the house refused to vote supplies unless its demands were allowed; thus the functions of the executive department were invaded and its independence crippled. While the King's officers demanded compliance with the King's wish that the province should build a fort at Pemaquid to protect the settlements in Maine, and establish salaries for the Governor, Lieutenant Governor and judges; the province refused the royal requests. The Court clung to its sole power to tax the people of the province and to control the money raised by taxation, while the mother country strove to strengthen the dependence of the colony upon the Crown.

In Parliament a bill was projected to vacate the charters of the colonies which called forth Jeremiah Drummer's Defence of the American Charters, in

which their sacred character as contracts with the Crown was upheld and in which the liberties of the colonies were held to be compatible with the prosperity of the Crown. The vehement disputes over the question of a fixed salary for the Governor, occasioned threats by the royal agent of an attack upon the charter by Parliament, as well as charges of disloyalty against the colony; but the House relied upon its powers under the charter and maintained the rights and privileges of Englishmen.

On the 8th of November, 1760, Wm. Pitt sent stringent orders to revenue officers in America to break up the contraband trade carried on with the French and Spaniards with whom England was at war. In Boston, writs of assistance, which authorized custom-house officers, "in the day time, to enter and go into any house, shop, cellar, warehouse or room or any other place, and in case of resistance to break open doors, chests, trunks and other packages, to sieze and from thence bring any kind of goods or merchandise prohibited and uncustomed, and to secure the same in his Majesty's warehouse."* James Ottis denied the power to grant any such writ, even by Parliament itself. The courts declared writs of assistance legal and the conflict between the government and the popular party in Boston went on. The House declared that if it should give up the right to originate all taxes, the province would then be under the rule of an arbitrary despotism.†

* Palfrey, vol. iv., p. 308.
† Palfrey, vol. iv., p. 320.

The denial of the power of Parliament to tax the colonies followed as a corollary to the right of the House of Representatives alone to tax the people of Massachusetts, and the dispute concerning duties, taxes and stamps upon paper, forms the prelude to the drama of the Revolution.

The organized force which carries a State through a revolution is of small value in the study of constitutional systems. It is difficult to describe the governments of the colonies during the Revolution except by detail. The Republican spirit of the times weakened the power of the executive and strengthened the legislative departments. It was the House that came from the people, that resisted the royal Governor. The governments were made to conform to the popular will. The people formed their own charters, local self-government prevailed.

The resolutions of the Continental Congress were the most authoritative expressions of the people's voice. Congress had been frequently requested by the colonies in revolt, to give its advice and direction in relation to the establishment of civil government where the royal governments had been driven out. On the 3d and 4th of November, 1775, Congress advised the colonial governments * "to call a full and free representation of the people in order to form such a form of government as in their judgment would best promote the happiness of the people, and most effectually secure peace and good order in their provinces during the continuance of the dispute with Great Britain."

* Jameson's Constitutional Convention, § 127.

This was followed by the resolution of May 10th, 1776, "that it be recommended to the several Assemblies and conventions of the United Colonies where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular and America in general." "This resolution," said John Adams, "was independence." The colonies now began the work of substituting regularly constituted governments for the Committee of Safety and other temporary powers that assumed the reins of government during the violence of Revolution.

Up to the time of the formation of our Federal constitution in 1787, the systems of government both State and National, were somewhat experimental. The statesmen of a century ago studied the problems of government, both by experiment and the teachings of history.

Improvements in State governments followed each other in quick succession, and our Federal government rose from the ashes of the Continental Congress and the Confederation.

In 1780, New York devised the method of a conditional veto by a Council, of which the Governor formed one. Massachusetts followed, placing a conditional veto in the hands of the Governor. The republican spirit of the early days of the Republic weakened the hands of the executive officer. Anarchy had become preferable to kingly rule. The legislative branch became the center of the systems.

Nowhere had the Governor of a colony power to dissolve the legislature, or either branch of it, and so appeal directly to the people. The Governor, however, could not be removed during his term of office except by impeachment.*

In September, 1779, a Convention, which the people authorized, framed for Massachusetts a Constitution. It was chiefly the work of John Adams, who took for his guide the English Constitution, the Bill of Rights of Virginia, and the experience of Massachusetts and other colonies. Adopted by the people, it continued to be the fundamental law of the State for forty-one years, a model system of government *by* the people and *for* the people.

* Bancroft's U. S. History, vol. 9, p. 268.

CHAPTER IV.

IV—THE UNION AND THE GROWTH OF A NATIONAL SENTIMENT.

The colonies that settled along the eastern shore of North America were at first united to their mother countries by various ties. Nearly all English, they clung to British laws and institutions. The Dutch in New York, the Swedes in Delaware, and the French of Canada, yielded to the invading progress of the Anglo-Saxon race; while the vigorous life of British institutions over-shadowed and absorbed whatever belonged to other European lands.

With the growth of the colonies new interests sprung up. American commerce, wearied of being a a child to be tutored by English laws, the old right of local self-government was infringed and numerous wrongs aroused the spirit of independence.

The Indians, who harrassed the growing colonies, were a common enemy to be met and conquered by colonial troops, while the enmities of England and France made the West a prey to European faction. Accustomed to local self-government, each colony for itself had struggled against the hardships of an unbroken wilderness, a savage enemy, a jealous mother country, and rivals on all sides, by sea and by land.—Thus, upon the Atlantic's western shore, grew up a hardy race, schooled in the principles of English

liberty, proud of the vast domain within its possession, confident of the grandeur of its future, and not a class of men to submit to foreign oppression; hence came the Revolution of 1776.

For common defence, a union of the colonies was necessary, but it was at first a union of necessity, and not of choice. Local jealousy, colonial pride, selfish independence crippled and weakened the Revolutionary army and prolonged the struggle for independence

A scheme of union had been formed in 1643 by four colonies; in 1754, by seven; in 1765, by nine; in 1774, by twelve; in 1775, by the thirteen colonies, and in 1781 the union had assumed the name of a Confederation, but they had been reluctant unions.

The Continental Congress represented the broken disjointed parts of what was destined to be one nation. It was an assembly of ambassadors from the States which obeyed its requisitions on account of the common danger from the invading enemy.

The war, by the aid of France, successfully ended, then the necessity for union was not so imperative, and discord and disunion prevailed.

As early as 1781 the Articles of Confederation were adopted, forming "*a perpetual union*" of the States, but giving to the general government only power to make requsitions on the States for the money needed to carry on the government.

The Confederation was not a union of "*the people*," but of the colonies, the States. The people of the colonial corporations, or thirteen original States, grew up with a love for their own local laws and institutions, and a jealousy of all foreign dominion. The

hostility toward Britain was changed to dread of Federal rule, and every power given to the general government was delegated as a necessity for common defence and general welfare.

The States struggled to withhold power both from the general government and from each other. For seven years the Confederation survived, but proved weak and inefficient.

Commercial discord had arisen among the States, armed rebellion had appeared in Massachusetts, foreign creditors had become urgent, paper money carried havoc among the nation's finances, treaties had been violated, and good men feared that independence would prove a curse instead of a blessing.

The suffering of the commercial interests of the country demanded reform, more power for the general government, and a more perfect union of the States.

The present Constitution superseded the Articles of Confederation, but its adoption was secured only by a hard struggle against the jealous independence of the States. It took the entreaties of Washington, the logic of * Hamilton, Madison and Jay, the eloquent words of many a noble soul, and the indulgent yieldings of many a firm patriot to procure the adoption of the Constitution of 1787.

The States loved to cling to what power they possessed, were jealous of its abuse in other hands than their own, feared for their rights, if united with others whose interests and laws were different. It was hard to get the States to delegate to the Confederation even

* See the "Federalist."

its slender powers, harder to prevail upon the conventions of the people to adopt the present Constitution.

The debates * in the Federal Convention of 1787, which formed the Constitution, and in the State Conventions, which adopted it, show how the friends of local self-government strove to withhold power from the general government.

The Federalists, as a party, embracing many of the truest men who ever served their country, desired a strong national government; the Democracy trembled at every power given to the general government or every prohibition placed upon the States.

"The Constitution," said Washington, "is the result of a spirit of amity, of deference, of mutual concessions that our situation imperatively demanded."

It is the merit of the Constitution, † says Laboulaye, that it was made by mutual sacrifices. No person said it was I who made it, each said I have carried such a clause, yielded on such another one. It was the common work of the greatest minds and best patriots of America. The Constitution formed, it was found to entirely please no one, but that was not a proof that it had no value. A constitution is not a work that a man creates by a stroke of his pen. It is a compromise between various interests, and every compromise is a mutual sacrifice.

The Constitution formed and half accepted by Congress, thirteen different States had yet to accept it. It had to be discussed and dissected thirteen times in thirteen States, having different ideas, interests and jeal-

* Elliott's Debates, five vols.

† *Historie des Etats Unis*, vol. iii.

ousies to be vanquished, and by the force of reason to maintain harmony between all the citizens.

Some good men could not assent to the adoption of the Constitution because of the strength of the union thereby formed. * "So destructive," said Luther Martin, "do I consider the Constitution to the happiness of my country, I would cheerfully sacrifice that share of property with which Heaven has blessed a life of industry, I would reduce myself to indigence and poverty, and those who are dearer to me than my own existence I would intrust to the care and protection of that Providence who hath so kindly protected myself—if, on *those terms only*, I could procure my country to reject those chains which are forged for it." Mason exerted all the powers of his great mind and Patrick Henry his matchless eloquence to defeat the Constitution in Virginia, but in vain.

What are some of the compromises in the Constitution which procured its adoption?

They were made between the small and the large States, those of the South and those of the North, between men who saw nothing but tyranny and despotism in a strong national government, and men who saw anarchy, confusion, and perpetual war in a mere Federal Republic, and who pointed to the Confederation as an example of a Federal system which was falling to pieces by its own weight.

The first great compromise was in the construction of the *Senate*.

The House of Representatives is composed of members, chosen every second year by the people of

* Elliott's Debates, i., p. 389.

the States, the more populous States sending more members—while in the Senate the States are equally represented. Under the articles of Confederation, the single Congressional body voted by States; thus the smallest State had as much authority as the largest. In the Federal Convention, the small States asked to have their power continued, but the larger States objected to the rule of a minority. The debate on the construction of the Senate and manner of voting therein was violent, and threatened the dissolution of the Convention. The Senate was finally organized to represent the equal political capacity of the States, the House representing the populace. The choice of the Senators was given to the legislatures of the States whose embassadors they are.

The Northern States differed from the Southern chiefly concerning the regulations about exports, navigation and slavery.

The South was an agricultural region, its wealth consisted in plantations and fruitful fields, producing cotton, sugar, rice, and tobacco, which were exported and exchanged for manufactures of other countries. The North combined agriculture, commerce and manufactures. To tax exports was to add to the cost of Southern products while the North, exporting little, would not feel the burden.

Both sections, importing goods, submitted to a duty on imports, yet the North in this had an advantage, since imposts helped the home manufacturer by raising the price of the article imported. A uniform duty upon articles used only in the South, must be all

* Elliott's Debates, vol. v.

paid by the South, and a duty on Northern imports, by the North. This was a source of strife in the Convention, but the South yielded mainly on account of concessions to slavery.

The difficulty of laying impartial imposts has always been felt, and in 1832 the dispute on this subject threatened the dissolution of the Union. Interest supplied the desire, and the belief in the existence of a mere Federal compact from which a State might withdraw, prompted South Carolina to attempt to nullify a fiscal law of Congress. General Jackson was not the man to fail to execute the laws and force intimidated Rebellion. The compromise of Clay pacified the discordant elements of 1832, and the taxing powers of Congress have since been peaceably exercised.

The need of authority to control foreign commerce was the greatest impulse to the formation of a national union, yet the South believed free trade to be for its interest and yielded the power to regulate commerce in exchange for protection to slavery and the slave trade. The importation of slaves was not to be prohibited before 1808, and fugitives from labor were to be returned. To the qualified voters of the slave States were added three-fifths of the slaves, who, although property, increased the number of Representatives from the South. The amount of direct taxes was increased for the South by this increase of representation, but direct taxes, that is capitation or land taxes, have seldom been imposed.

The Constitution finally having been adopted, went into full operation in all its departments on April 30,

1789. Soon twelve amendments were added to it, and the Judiciary having, by act of Congress, been organized, was called upon to construe the powers vested in the government. Two methods of construction have been advocated.

The friends of strict construction and State rights held the union to be a mere compact of sovereign States which could resume at will the functions which they have delegated to the Federal government.

The friends of liberal construction have maintained that the union of the States is an indissoluble nation —sovereign in all those functions which the people have delegated to it.

For seventy years the dispute went on. At times the union was on the verge of dissolution. In 1802, Fisher Ames stood up in the House of Representatives to speak on the Jay treaty. He was a Federalist firm and true. He had seen the nation struggle through years of imbecility and now he sees it trembling to apparent dissolution on account of difference of opinion about a foreign treaty. With trembling voice and broken health, the feeble patriot closed his remarks with these words: "If the vote should pass refusing to make laws necessary to carry into effect the treaty, and a spirit should rise, as it will, with the public disorders, to make 'confusion worse confounded,' even I, slender and almost broken as my hold upon life is, may outlive the government and Constitution of my country."*

New England was jealous of the preponderating influence of the West and South, and believed the

* F. Ames' Works.

purchase of Louisiana to be unconstitutional and the war of 1812 a mere party measure of the Democrats. In the Hartford Convention of 1814, the war measures of the government were denounced as destructive of the rights and interests of the people, and New England was united in demanding more restrictions upon the general government. When the question came up in Congress upon the admission of Louisiana into the Union, Mr. Josiah Quincy, of Massachusetts, gave expression to the sentiments of more than himself when he said: "It is my deliberate opinion that if this bill passes, the bonds of the union are virtually dissolved; that the States which compose it are free from their moral obligations, and that, as it will be the right of all, so it will be the duty of some, definitely to prepare for separation, *amicably if they can, violently if they must.*" Here was secession from Massachusetts.

There is no doubt, however, that finally the war of 1812 united the nation more firmly by the vindication of its independence. In 1832, Calhoun and his friends felt that it was for the interest of the South not to remain in the Union, but the compromise measures of Clay retarded the "irrepressible conflict" between the North and the South.

The institution of slavery was, from the foundation of the government, an object of jealous care to the South, but a subject for lamentation, and often tirade and abuse by the people of the North.

The South asked favors for slavery in the Constitution and received them, demanded national laws for its protection and received them, finally secession was

the only way that might save slavery, and the South seceded. Secession was claimed as a right under the Constitution, and the court of arms was appealed to in maintenance of that right. The war settled the right of any State to secede, but how did it settle it? It did not take away the right of revolution, which is as sacred as the personal right of self-defence, which no law can take away. "Whenever any form of government," says the Declaration of Independence, "becomes destructive of the ends for which it is instituted among men, it is the right of the people to alter or abolish it and institute a new government." In the long debate and final contest against secession, this right was never denied or affected. The right of Revolution is sacred, and by no laws or institutions can it be taken away.

The State Rights controversy had been long and bitter, it ended bloody and disastrous to the disciples of Mason, Randolph and Calhoun, fatal to slavery which ever added fuel to the intellectual combat, and passion to popular agitation.

The war over, the nation had felt the shock to its foundation. *Inter arma leges silent.* Every nerve had been strained to its utmost for national salvation, and like an athlete, victorious from the contest, the nation felt the strength of triple brass in its sinews and assumed all the powers and prerogatives to which, by the law of nations, it was entitled.

When Mr. Stevens, in Congress, declared that they were passing laws outside of the Constitution and regardless of it, he gave expression to the national

struggle that was determined to preserve the Union and the life of the nation.

When Mr. Hoar offered a bill in Congress to place all the schools in the land under national supervision, he seemed to think that the boundary lines of the States had faded before the nation's new vigorous life, and that the States had become mere provinces of a vast empire whose chief was at Washington, and whose soldiers were in every city of the nation.

The national spirit and strength that carried on the war for the Union and triumphed in legislation, also gave us the Thirteenth, Fourteenth and Fifteenth amendments.

The Constitution and twelve of the amendments were the fruits of peaceable deliberation. The time came when compromises could no longer settle the difficulties between the North and South.

The "irrepressible conflict" went on and to arms was the last resort. Then came the three amendments that have in them no elements of compromise or accommodation. Bold, sweeping, comprehensive, impartial; they embody the fruits of the conflict, are hostile to rebellion and destructive to slavery. State rights no longer cherished and slavery no longer defended, but these elements of discord swept away and the omnipotence of Congress held in check by almost nothing but the restraint of the powers of the Supreme Court.

With a liberal construction of the Fourteenth amendment to the Constitution, we might have the Federal courts adjudicating local affairs, and might soon lament because the nation's victory was a victory

over ourselves, and Congress in legislating for the enemy had swept away our local independence.

Fortunately the Supreme Court applies the new amendments to secure justice to the negro, and thus the national government is restrained toward the ends for which it was at first instituted.

It is too soon to describe the workings of the new amendments and prediction may be useless, but it is certain that the importance of the States has faded before the might of the nation, and unless the people keep a jealous guard over the paladium of local independence in affairs which have not been given up to be managed by the general government, we may some day deplore the omnipotence of Congress and the despotism of Federal power.

The sad pictures of the opponents of a centralized bureauocratic nationality are drawn after contemplating the social, moral and political degradation of a despotic government. The laws under which a nation lives are the result of national character, but they, in turn, mold or influence the entire social system.

With the destruction of local independence, with the loss of government by the people, comes an abject dependence on government, which has been well called an accursed inheritance from the days of the divine right of kings.*

No man who loves republicanism or takes an interest in the cause of humanity, can look with unconcern upon the general government doing anything which the individual or the locality can do as well.

* Pres. C. W. Eliot's Address on a National University, Aug., 1873.

Self-reliance preserves liberty, union only gives strength.

The ties then that should bind the nation together are not stringent laws or standing armies, but a noble history in which all have a common pride, similar laws and institutions derived from a common British source, a commerce that unites our people into one great commercial city, every day drawn closer and closer, a true patriotism that desires to do equity to all sections of the country, and advance the true interests of all.

We are justly proud of the Union and we glory in the strength of the nation, but let us ever be vigilant and jealous of the rights of individuals and localities, hostile to every act of injustice to any man, then we shall do our part toward making national unity a blessing and not a curse.

CHAPTER V.

V.—THE TRIPARTITE DIVISION OF THE POWERS OF GOVERNMENT.

"The fundamental constitution of the English government," says Montesquieu, "is that the legislative body, being composed of two parts, one checks the other, and both are checked by the executive power, which in turn is also checked by the legislature." "There is no liberty," he continues, "if the power of judging be not separated from the legislative and executive powers." *

"The tripartite division of powers," says Laboulaye, "is avowed in all the constitutions of the last eighty years. An essential element of liberty is that the legislative, executive and judicial powers should be separated." †

In the individual, the judicial or deliberative faculty generally acts previous to the legislative or rule determining faculty; then, when plans are matured and laid out, the execution of them follows. This separation or analysis of individual action, however, is a work of subsequent observation, of no very important aid to the individual. On the contrary, it is to most persons such a discovery as was that of the

* "Spirit of Laws," vol. i., book xi., ch. 6.

† Constitution of U. S., in *Histoire des Etats Unis*, vol. iii., p. 289.

man who had learned with surprise that he had been speaking prose all his life without knowing it.

As these three faculties united in the individual may form a noble, generous man, so a despot, exercising the three departments of government, might be an excellent ruler. "But nothing," says Laboulaye, "is such a corrupter as power." History has shown the need of dividing power, so as to restrain its corrupt use. Montesquieu, in his famous chapter on the English constitution, written 1748, was the first Frenchman who pointed out the importance of this separation and its value to English liberty. "If the same individual," says he, "can make the laws as a delegate of the nation, apply them as judge, and execute them as sovereign, then this man is a despot, and all is lost." *

What more perfect definition of despotism can we have than that it is sovereignty concentrated into a single hand? A despot is a man who does everything without rendering an account to any one. †

Blackstone and Paley recognized the truth of Montesquieu's observation, and in the United States it has been a universally accepted doctrine that the separation of the three powers is essential to liberty. Still, this theory of the tripartite division of powers is not carried out strictly in practice.

In England, the King forms a part of Parliament, no law being made without his approval. The veto of the King has not been exercised since the reign of Queen Anne; still, through the Prime Minister, the

* Spirit of Laws, vol. i., bk. xi., ch. 6.

† Laboulaye, vol. iii., p. 289.

laws all receive the approval of the King or Queen. Parliament controls the administration, by compelling it to resign unless it agrees with a majority of the Commons, but the Prime Minister has his seat in the House of Commons, and is heard on every important measure.

The Commons impeach, and the Lords sit in judgment upon the acts of high officers of government, and English judges proclaim that to be law which never received the approval of the legislature.

With us, too, the three departments are blended. The suspensive veto * of the President gives him legislative power, and the precedents of our courts are our laws. The Senate, too, is part of our executive power, since its consent is necessary in the appointment of many executive officers.

Thus, we see that political theories are not to be treated as mathematical axioms. The beneficial separation of the three powers, consists really in each having its province, but not in each being isolated. Separate, but each a check on the other. The President, with his veto, restrains Congress, which, in turn, can impeach the President, and the Judiciary can make void the illegal work of the other two powers; the Judiciary, in turn, liable to impeachment.

The tripartite division of the powers of government, then, is observed to be of some value, and is a separation that consists in not placing the legislative, executive and judicial powers all in the same hands; while this ought not to hinder the executive from taking a part in legislation, the latter from influenc-

* Const., art. i., sec. 7.

ing the former, or the Judiciary from supplying the needed sufficiency of the laws, and by its sheriff or marshal executing these laws, as does the President execute the laws of Congress.

Indeed, the absolute separation of the departments creates a war among them in order that each may keep its proper place. The uncontrolled acts of either power may end in despotism.

"The efficient secret of the English Constitution," says Baghot,* "may be described as the close union, the nearly complete fusion of the legislative and executive powers. "No doubt," continues he, "by the traditional theory, as it exists in the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the Cabinet*, a committee of the legislative body selected to be the executive body."

Whether the traditional theory, as it exists in the books, attributes the goodness of the English Constitution to the entire separation of the legislative and executive authorities, I do no not pretend to say, but it is certain that Blackstone,† a century ago, said: "The total union of the legislative and executive powers would be productive of tyranny; the total disjunction of them would, in the end, produce the same effect, by causing that union against which it seems to provide." "The true excellence of the English Constitution con-

* Eng. Const., p. 76.

† Com., vol. 1., p. 154.

sists in this, that all the parts of it form a mutual check upon each other."

Our Constitution is modeled after that of England, and Blackstone described the institutions of England as our fathers knew them. George III. assumed and exercised far more power than is used by Victoria, and the growth of the power of the Commons has adapted the English Constitution to the progress of the democratic spirit, while the Reform Bills of '32 and '67 have enabled the Commons to represent the people and not merely boroughs. The executive power is no longer the King or Queen, but in fact the Cabinet, which is as truly elective as is our President, but elected by the Commons.

The powers of our President are very like those of George III., whose separation from the two houses of Parliament and independence of them, led him to do more than merely obey the majority of the House of Commons.

While the President has a suspensive veto, and must not execute a law passed during his administration, unless two-thirds of both houses of Congress compel him, the English Prime Minister must procure a majority in the Commons or he is suspended himself. True, if the people will support his measures, he may safely appeal to the ballot for a new Parliament, but the majority of the Commons makes the laws and executes them by its own leader. Legislatures, in the name of the people, seek their own aggrandizement. The Commons of England have become almost absolute, and may also become tyrannical,

as may our Congress, if the President ever abandons his veto power.

The separation of the legislative and judicial powers is very important in our system of laws, since it may be the sworn duty of our judges to make void the act of the legislature, by not obeying the requirements of its enactments.

Our Constitution being our highest law ruling the three departments of government, prescribing the powers and jurisdiction of each, it becomes of the highest importance to have a power to keep all the others within their spheres. This King, as it were, of our Federal system, is the Supreme Court, which, while performing its duty, knows no master except the Constitution and the sovereign people, speaking by an amendment to the Constitution.

At the same time, wherever discretionary power is vested in an officer, the courts, which merely declare what the law is, cannot reach the exercise of that discretion. Measures exclusively of a political, legislative or executive character cannot be reviewed or examined in the courts, since supreme authority as to those questions belongs to the legislative and executive departments.*

The people must have more checks upon the abuse of power than the separation of departments, and the supervision and check of one upon the other. Responsibility to a pure, upright constituency, and fre-

* In the case of Willis Lago, whom the Governor of Ohio refused to surrender to the officers of Kentucky, the Supreme Court (13 Mar., 1861,) said: "But if the Governor of Ohio refuses to do his duty, the General Government cannot compel him."

quent elections, are necessary to preserve the people from the abuse of the discretionary power of officials. If the people be corrupt, their government cannot be popular and at the same time pure.

In England, the Supreme Court is composed of a committee of the House of Lords, or of the Privy Council, but since Parliament is almost unlimited in its power to pass laws, the question of the legality of acts upon which the judges themselves voted, is not apt to come before the law Lords. There is thus little fear of their acting as judges in their own case.

The belief of many wise men, in the danger of the legislature gradually destroying the power of the Judiciary, and crippling the executive, is worthy of notice. The danger having been known, has been avoided. Many cases have been decided by the Federal courts, regardless of laws passed by Congress, thus making void Congressional acts; yet no attempt to destroy the judicial power has prevailed, nor has the President lost any of his power or influence in the government, as defined by the Constitution.

While our Constitution might last but a few days with a nation accustomed to arbitrary or despotic government, our submission to the laws of the land and the adjudication of the courts, will perpetuate our Republic.*

Of the pre-eminence of our Federal Judiciary the nation is justly proud, for no chapter in American history is a more noble record than that of the United States courts. Our Supreme court may not be infallible, and its dicisions may be reversed by itself. In the Dred Scott case, in which it denied citizenship to the

* Electoral Commission, 1877.

negro, an amendment to the Constitution was called for to define citizenship,* and thus the people reversed the decision of its highest tribunal and at the same time gave it new and greater powers.

The tripartite division of the powers of the government then is only such an arrangement as enables one officer to check and control another. It may be said to be the key to the successful organization of free government. Separation is but a means of weakening governmental authority, responsibility being a check upon every minute ramification of power. That power to which every officer of government is finally responsible is the *Sovereignty*.

It is admitted by political writers that a sovereign power must reside somewhere.

France admitted it often, but placed it in some one of the branches of government. A legislature assumes itself to be the sovereign, and the despotism of an Assembly becomes one of the blackest pages of history.

The thirty tyrants of Athens assume sovereign power and the many-headed monster illustrates the evils of irresponsible power.

With us, the supreme sovereign authority is not in the entire Federal government, not in the States, but in the people, if it is anywhere. The people have given up some of their power to the Federal government in trust to be used for their benefit, some to the States for a like purpose, some to the county, some to the city, but all the officers and agents of government are but servants acting under authority delegated from

* XIV. Amendment, sec. i.

the people. The people have given, the people can take away. They are willing to trust to the laws to secure the possession of life, liberty and happiness.

At what time the people delegated certain powers to the government is often a difficult question even for antiquarians. Having inherited as much of the common law of England as was adapted to our situation, the origin of many of the powers of our government—both Federal and State—is involved in obscurity. Our Federal government possesses many of the powers held by the mother country before our Independence, and the Constitution of 1787 only systemized and strenghtened powers already existing in the Confederation. When did the people give to Parliament its powers, to the States theirs, are difficult historical problems. It is worthy of note that our Federal Constitution is like a work of addition, is a process of creation; while the State Constitutions are like acts of subtraction, are processes of taking power from the legislatures. The legislatures are presumed to be omnipotent, unless the people have stripped them of power by constitutions, or by delegating powers to the general government inconsistent with the exercise of a similar power in the States. Be our government formed by adding to the powers of Congress or by stripping the legislatures, the people are till sovereign.

Believing that liberty would be served by a tripartite division of powers, other checks upon delegated authority of a similar nature, were placed in the Constitution to render permanent and effective that threefold division.

United States officers are prevented from acting as legislators, and Congressmen are forbidden to create or make more desirable Federal offices for themselves, * yet strange to say they are not prevented from regulating their own pay at any time, nor that of the President every four years. In order that the President may represent the people, no officer, executive or legislative, can be a Presidential elector; † yet the host of executive officers can labor for the selection of their chief and Congressmen can enjoy the patronage of appointments as a reward for partisan efforts.

The legislature being the strongest branch of the government, the greatest check upon it is in declaring the Constitution and laws made in pursuance thereof ‡ to be the supreme law of the land and binding by oath all officers to obey the Constitution.

Again came a division of the Legislature into two branches, and prohibitions against the enactment of laws except for certain definite purposes. Impeachment, too, like the sword of Damocles, hangs over the President, Vice President, and all civil officers of the United States.§ Last of all, an amendment to the Constitution can check any injurious use of power assumed or granted. ‖

Many laws are made to delegate power to individuals, more are made to check the use and abuse of

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* Art. I., sec. 6 and 2.

† Art. ii., sec. 1 and 2.

‡ Art. vi. 2.

§ Art. ii., secs. 3 and 4.

‖ Art. v.

authority; still a mistake is sometimes made in not giving officials enough power.

The great difference between the Confederation and the present government is in the greater ability of the latter to execute its laws by acting upon the individual with executive and judicial powers, instead of mere requisitions upon the States. Our government neither borrows the hands of the States with which to work, nor the Judiciary of the States to sit in judgment on its laws, but by its own executive officers and its own judges; it says to the States thus far shall you go, and no further. Our Federal government is not like a rational man who can merely lay down precepts for others to obey, if they wish, but like an independent man guided by the best wisdom of all time, it walks among the nations of the earth, growing stronger and stronger, and if we be true to our trust, it may keep growing better with its increasing strength, supreme and uncontrolled in the peculiar powers and functi which have been delegated to it.

CHAPTER VI.

VI.—TWO CHAMBERS, OR THE SENATE AND HOUSE OF REPRESENTATIVES.

It is generally admitted that the distribution of lawmakers into two chambers is beneficial. If the two chambers be composed of the same kind of men, elected in the same way, even then there are advantages to be derived from the legislative power being deposited in two distinct bodies of men. Legislation is delayed, and a chance given for more thorough investigation of the bills passed by both houses. When the approval of two distinct bodies of men is to be secured, a full, free discussion of the measures proposed is likely to arise, and thus precipitation avoided, and the people can be heard from for or against the measure

Small bodies are usually better for deliberation, and not subject to the sway of passion, as are large assemblies, but this objection to a single large chamber is obviated by the use of committees.

The utility of two chambers is demonstrated by the fact that constitutions of recent formation provide for two legislative bodies; and it is now almost universally admitted that two chambers do tend to prevent rash, hasty legislation, and to secure for the laws the endorsement of two distinct deliberative assemblies.

History furnishes us with accounts of the doings of second or higher chambers, corresponding with our

Senate, and their nature may be studied with profit. Rome had its Senate, Venice had its Council of Ten, Austria its Aulic Council, and England its House of Lords, while constitutions of more modern date usually provide for a second chamber, and form it of men of different qualifications from those who compose the first, or popular house. Thus, to the common advantages of a second chamber are added elements which represent the nation more fully and fairly than would even two bodies similarly composed.

The United States Senate was formed, not so much for the advantage of having a second chamber, as for preserving by it the equality of the States in the Federal Union. The Constitution speaks of the Representatives being elected "*in*" the States, but the Senators are said to be chosen "*for*" the States. The jealousy of State sovereignty runs through the entire Constitution, and, I may add, through the entire history of this nation. So jealously did the friends of State sovereignty guard the individuality of the States, that the Constitution forbids any amendment to be made depriving a State of its equal representation in the Senate.*

Moreover, the Senate was the department of the government which was viewed with peculiar favor by the Federal Convention. The friends of a strong government stopped not at the favors that the States rights party wished for the Senate, but Hamilton wished the tenure of the Senatorial office to be—like that of the Federal judiciary—during good behavior, or what is the same thing, for life.

* Art. v.

A Representative need be only twenty-five years of age and seven years a citizen; a Senator, thirty years of age and nine years a cltizen. The small States having obtained a defence from all aggression from the larger States, as well as the national government, by their equality in the Senate, which can by no amendment be changed, then yielded powers to the general government, which only a Senate representing States could have obtained.

The term of office being six years, giving stability and strength to the Senate, the judicial power to try all impeachments, a share in the executive power by its advice and consent in appointments, and the power to join in making and concluding treaties, by giving its advice and consent, show the superior confidence in which the people held that body.*

The interests of the States have been by it carefully guarded, while the good of the nation has not been neglected. Its treaties may have been unpopular, yet in time the people have usually approved of its measures. To our Senate, men are accustomed to look not so much for a body intent on guarding the interests of the States, as for a class of men distinguished for wisdom, patriotism and integrity. There Webster and Hayne discussed with equal zeal and earnestness the doctrine of nullification; Calhoun denied the *surrender* of sovereignty to the Federal government by the States or by the people; Clay expounded the powers of Congress, and Sumner plead for the rights of man. History has taught State pride and national honor alike to go to the Senate for their

* Art. i., sec. 3.

champions, and as the Roman Senate organized the forces that achieved the conquest of the world and was esteemed the corner stone of the Roman Republic, so our Senate, in the eyes of foreign nations, is held to be the most stable part of our government and the sole arbiter of foreign affairs. The Roman Senate was not composed of men elected by a popular vote, but of men chosen by the Censors. Every five years the censors revised the list of Senators, nor was the choice of Senators by the censors arbitrary. A line of promotion prepared men for the Senatorial order, and gave Rome her eminent statesmen. Let a man become eminent in the British House of Commons, and the Lords welcome him as a peer. Thus, nature's aristocracy in England protect and defend her hereditary aristocracy, and the Lords boast of their Eldons, Broughams and Pitts. Our Senators, being chosen by State Senators and Representatives, are honored and trusted by a class of men who are presumed to be acquainted with the men of ability and worth throughout the State. While mere popularity may secure for a man a seat in the House, the Senate is usually reached by qualities of a more solid nature.

The Representatives * are chosen "by the people of the several States," and hold office for only two years. A vacancy in the House is filled by the tedious process of a writ of election issued by the State executive to the people of the unrepresented district, whereas a vacancy in the Senate is filled by an appointment by the Governor of the State until the Legislature thereof

* Art. i., sec. 2.

can elect a new Senator. The Senatorial office is too dear to the State for it to allow it to be long vacant.

While the House elects its own Speaker, the Senate has the Vice-President of the United States for a presiding officer, and thus every State has an equal number of men upon the floor. When the Senators are equally divided, the Vice President, representing the whole nation, gives the casting vote. When the Vice-President is acting President, or is unable from any cause to preside over the Senate, that body elects its own President, but the man so elected may chance to become acting President of the United States.

The House can alone impeach, but the Senate has the sole power to try all impeachments, and while ordinary juries which try high crimes and misdemeanors are required by the common law to be unanimous before they can convict, the Senate can convict by a two-thirds vote. True, a verdict that can only remove from office and disqualify a man from holding and enjoying any office of honor, trust or profit under the United States, is not so severe as that of a jury which may be followed by sentence taking away life or liberty; but the Senatorial censure is nearly as severe as exile.

To Congress was given the sweeping power to make regulations concerning the times, places and manner of holding elections for Congressmen,* and to alter such regulations about the same as the States may have made, except as to the place of choosing Senators. The many friends of the colonial corporations, or States, saw that the right of self-preservation en-

* Art. i., sec. 4.

titled Congress to a control over the composition of its own body, but they refused to give Congress power to say to the State legislatures: "Abandon your capitol; go to where I tell you to elect Senators."

When the House of Representatives is empowered to elect a President of the United States by reason of no man getting a majority of the electoral votes, the Representatives are not permitted to vote as individuals, but the delegation from each State has one vote. When the Senate, for a like reason, is empowered to elect a Vice-President, they vote as individuals. In the former case, a majority of the whole number of States is nesessary for a choice; in the latter, a majority of all the Senators. Thus, we see the favor with which the Senate is viewed in the structure of our government. Its preponderance of power as a body is due, partly, to its peculiar fitness for the duties and powers imposed upon or vested in it, but chiefly did it receive its position in the government because it represented the States in the Federal Union, and formed the basis of the compromise which was necessary to secure the co-operation of the various sections of the country.

As in England, the Lords represent the aristocracy and the Commons the masses of the people, so with us, the Senators represent the corporate bodies known as States, and the Representatives stand instead of the individuals, who compose the nation. In ancient times, no government was entirely similar to ours, nor as like it as is that of England. The idea of representation, as we understand it, was unknown to the nations of antiquity. True, they had Republics,

popular assemblies, senates, presidents and elections by the people, but the idea of a man chosen by his constituents to pass laws for them and in their stead, never entered into the policy of ancient Republics. The Republics and Federal governments of Greece had their popular assemblies, but in them each male citizens voted on the passage of laws and took part in the proceedings of their Parliamentary bodies, as do now our elected Representatives.*

In the Federal Leagues of Greece—especially that of Achaia—the popular assembly was composed of private citizens who could afford to bear the expense of going to the capitol, but the citizens assembled from each member of the League had but one vote, as is the practice with us when the President is elected by the House of Representatives. The jealous sovereignty of independent States then, as now, endeavored to guard against the preponderating strength of associated governments. History has shown that the same tenacious grasp of power which has characterized small States, is seen in consolidated governments. Power once held is slow to be abandoned, and the dissolution of confederated or consolidated governments, when it becomes necessary, is generally the work of bloody revolution.

The Senates of ancient times were select bodies of aged men, and at Rome, Sparta and Athens, once elected, the venerable chieftain held the office for life. In the Achaian League—which approached the nearest to our form of government of any other—the Senate had its powers and duties defined by the popular

* Freeman's History of Federal Government, vol. i.

assembly, which was composed of the sovereign people. The President of the League, too, was the commander-in-chief of the Federal army; he could not be elected for two successive years or terms, but the approval of the Assembly was shown by frequent re-elections.

The executive department of our government is strengthened by the division of the legislature into two houses. The President is enabled more effectually to prevent legislation which he condemns since it is more difficult to obtain a two-thirds vote in two assemblies than in one large one. Men will not be so rash and inconsiderate when they know that another body stands ready to approve or condemn their work. The President's opposition, too, on account of his power in the matter of appointments, is by no means desired by Congressmen.

The President's part in legislating is of a negative nature, and when he stands in the way there must be some strong sentiment, some vehement passion, to enable Congress to pass a bill. The chance is, too, that one chamber will be on the side of the President, and thus by division, congressional action is held in check and the President is able to dictate the policy of Congress.

The authority given to Congress is very great, and it has the sweeping privilege of passing all laws necessary and proper for carrying into execution the powers vested in Congress, and *all other* powers vested by the Constitution in the Federal government or any department or officer thereof. * It is for Congress to

* Art. 1-8-last.

provide the ways and means for carrying into execution the manifold operations of the government. It may ordain and establish Federal courts inferior to the Supreme Court which alone is known to the Constitution. The compensation of the Federal judges might be fixed by Congress so low that none but the wealthy or corrupt could afford to act as judges. Moreover, Congress having power to regulate the appellate jurisdiction of the Supreme Court and to organize the inferior Federal courts—as it did by the Judiciary Act of 1789—the entire judicial department of the government by an ambitious, despotic Congress might be reduced to almost impotent helplessness.

Thus is seen the wisdom of having a second chamber, where a few men—conservative as a natural result of age and the long study and practice of the law—can withstand the rashness of a more numerous and popular assembly where passion and not reason often hold sway. In our history the Senate and the President have had the duty to perform of checking the popular house.

Washington refused the demand of the House to lay before it a copy of the instructions to Mr. Jay and other documents relative to the Jay treaty with England. "The power of making treaties," said Washington, "is exclusively vested in the President by and with the advice and consent of two-thirds of the Senators present; thereupon the treaty becomes the law of the land."* The House had to submit and vote the money needed to carry the treaty into effect

* Statesman's Manual.

President Jackson vetoed bills that Congress cherished as vital to the welfare of the nation. He deemed the United States Bank an odious monopoly, and his veto of the renewal of its charter was sustained by the people in his triumphant re-election. Congress voted a subscription of public money to the stock of a private company—the Maysville Road Co. Jackson successfully opposed the bill as unconstitutional, impolitic, injurious and demoralizing.

Presidents Tyler and Andrew Johnson made a free use of the veto power, opposing the favorite measures of the parties that placed them in office, but only when the time shall come for writing the history of the Whig and Republican parties, can it be said who were right.

Conflicts between the two chambers of Congress, if settled at all, are pacified by means of committees of conference and compromises; the opposition of the President can be overcome by a two-thirds vote of both houses.

Nearly every veto is a triumph of law. "The nation is free," said Benjamin Constant, "when the deputies are shackled." With a pliable President, or one who cares not for law or constitution, then with us Congress is unshackled, expediency becomes law and soon distrust and anarchy will take the place of order and good government. "*Corruptissima respublica,*" says Tacitus, "*plurimae leges.*" In a degraded corrupt government the statute books become ponderous volumes. Some of the best legislation of modern times has removed the restraints applied by former law makers. The protective system of special

legislation, the burthens imposed upon society by old law are attacked and removed, and for securing these liberties to the people men are applauded as statesmen and reformers.

Government being a necessary evil, the less we are governed the better, as long as peace and order reign.

CHAPTER VII.

PROVISIONS IN THE CONSTITUTION IN THE NATURE OF A BILL OF RIGHTS.

A Declaration, or Bill of Rights, determines certain powers that are excepted out of the general powers of government. History teaches that there are certain personal rights that men in office are prone to violate. To prevent a repetition of that violation, the government is prohibited by law from doing certain things.

That all governments derive their just powers from the consent of the governed, is an old political maxim. "There are three fundamental principles of the English constitution," says Macaulay, "which no one can say when they began to exist. As far back as history can go, the King could not legislate without the consent of his Parliament, nor impose any tax without the consent of his Parliament, and he was bound to conduct the executive administration according to the laws of the land, and if he broke those laws his advisers and agents were responsible." In like manner, the consent of the people is the origin of the powers of our governments.

The great political problem on this continent has been to preserve the rights of the individual, and at the same time establish an efficient government. The emigrants to America had been trained to guard against the usurpations of power, and the most precious

jewels in all the charters and constitutions in our history, are the prohibitions by which the rights of the individual are protected from the violence of tyrannical laws and an arbitrary use or abuse of power.

When oppressive laws are passed and government becomes destructive of the ends for which it was instituted, men cease to submit with passive obedience. History is tame and uninteresting when destitute of revolutions. While private life is contented, and the political life of a nation keeps on undisturbed; while material prosperity forms the chief aim of its citizens, the historian has smooth sailing, where no waterfalls or impending rocks give life and animation to his course. But when an oppressed people demand a redress of grievances, when the insolence of power is no longer endurable, when civil wars and revolutions arise whereby the people strive to secure the ratification of rights forcibly demanded, then it is that history is worthy of study.

Our Constitution was framed for a people trained in the school of English liberty. In the long contest for civil and religious freedom, wherein were employed every element that the ingenuity of man could devise, many battles had been fought against the claims of arbitrary power. Violent Princes, presuming that they ruled by divine right, had been checked in their mad course of oppression, and many a noble soul gave up his life in prison or at the block in behalf of liberty.

The main fruits of the contest are recorded in *Magna Charta* of 1215, the Petition of Right of 1629,

and the Bill of Rights of 1688—charters that are all dear to every liberty-loving people.

The principles that guided the men of 1776 were reaffirmed in the convention of 1787. The Declaration of Independence was not the mere production of Jefferson, it was the ripe fruit of all the ages wherein men struggled for light and liberty. From the days of the predatory despotism of William, the Conqueror, to the Declaration of Independence, is seven centuries, and during all that time popular rights plead for recognition.

Nor did the American Revolution lull our ancestors to sleep, or make them forget that "eternal vigilance is the price of liberty." English history is our history, and *Magna Charta* contains limitations upon governmental power which our Constitution again secures for the people. The progress of freedom in England was slow and imperfect. The memorable thirty-ninth section of *Magna Charta* which the barons, sword in hand, extorted from King John, began "*Nullus liber homo,*" no free man was to be deprived of trial by a jury of his peers, or by the law of the land. In 1215, probably one-half of England's two millions of inhabitants were slaves in abject wretchedness. No clause in *Magna Charta* speaks the language of our Thirteenth amendment. "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist" within England or any place subject to its jurisdiction—nor, inheriting English laws, as we did, could our Constitution have been adopted in 1788 with such a clause in it. As the English Constitu-

tion, growing with the growth of the number and power of the English people, has become more enlightened and free with the progress of civilization, so our Constitution has kept pace with the progress of the world. Thus the sphere of individual liberty has been enlarging for centuries, and the powers of government in the meantime have been more strictly limited and defined.

To trace the progress of individual liberty in this land for the past century is not attempted, but I shall speak of the protection to life, liberty and property guaranteed by the Federal Constitution and its amendments.

It was not strictly correct to say that the men who formed the Constitution asked the adoption of it while it yet contained no bill of rights. Its prohibitions upon governmental power almost equal those of the amendments that were passed expressly to secure the protection of person and property.

The entire Federal government is itself constrained to the exercise of only such powers as have been delegated to it, all other powers being reserved to the States or the people. It is the State governments against which the individuals must guard by a bill of rights. The States have all the prerogatives of power except what have been expressly taken away, and it is the plenitude of their powers which the individual needs dread. The Declaration of Rights in the new Constitution of Pennsylvania is fitly made the first article thereof, and its twenty-six sections indicate the necessity of restraining the State "that the general, great and essential principles of liberty and free gov-

ernment may be recognized and unalterably established."*

Let us trace the history and note the importance of the various clauses in the nature of Declarations of Rights in the Constitution itself in the first place.

The trial by jury or the law of the land and privileges of the writ of *Habeas corpus*, whereby neither justice nor right was to be sold, denied, nor delayed to any man, were the crowning glories of the great charter, and for six centuries have formed the most distinguishing characteristics of the English Constitution.

True, the writ of *Habeas corpus* was rendered more actively remedial by the statute of Charles II.; yet the principle of the writ, the taking of a man from prison to inquire into the cause of his commitment, and discharging him if not legally confined—pervaded the English laws four centuries before the time of that King and the *Habeas corpus* act of Lord Chief Justice Shaftsbury.

The origin of trial by jury is unknown. As far back as English history goes, even into the history of the Danes, the Germans and the Normans, the question of a man's guilt or innocence of a criminal charge was determined by a free and enlightened body of his fellow citizens, and not by officers of the executive authority.† But in England alone ‡—unless Normandy be added—juries have ever been distinct from the judges, who compose the court. In

* Const. of Pa., art. 1.

† Creasy's Eng. Const., p. 188.

‡ Forsyth's Hist. of Jury, chap. ii., iii.

England juries were summoned for the sole purpose of giving a true saying (*veredictum*) on a question of fact, and never have had anything to do with the sentence of the court, which follows the verdict of the jury. Because, says Forsyth, the functions of the jury have always been distinct from those of the judge, the institution of trial by jury has been perpetuated in England. From judges of mere questions of fact in criminal trials the step to a like function in civil causes was easily taken, but when it was taken is unknown.

In the reign of Henry the Second (1154-1188) trial by jury was regulated and established on a basis very similar to the jury system of to-day. A law of the time of Edward I. compelled men to submit the question of guilt or innocence to the jury, and many other important changes in the laws regulating trial by jury have been made during the many centuries of the existence of that noble institution, but the changes have only rendered jury trials more and more efficient in preserving and vindicating the lives, liberties and possessions of an intelligent and upright people.

The Constitution wisely avoided specific regulations of jury trials except in requiring "such trial to be held in the State where the said crimes shall have been committed, but when not committed within any State the trial shall be at such place or places as Congress by law may have directed."* The memory of the transportation of suspected criminals from America to England for trial, was fresh in the minds of our forefathers and the wide extent of

* Art. iii.-2.

the Federal government might well call for this precaution against the use of a jury prejudiced in favor of the prosecutor. Indeed the discretionary power of selecting jurymen placed by Congress in the hands of United States marshals, gives just grounds for complaint against the injustice of Federal judicial administration.

No bill of attainder or *ex post facto* law shall be passed. The legislature, or rather Parliament, by bills of attainder declared a certain act to be treason or convicted a man of treason, not by a judicial investigation, but by a mere resolution. An *ex post facto* law applies only to criminal affairs and either increases the punishment of an act already committed or makes that criminal which when committed was not so. It is a prohibition upon Congress in favor of the offender, and marks the progress of legislation from the madness of a savage age to the mildness of beneficent laws. Mr. Wilson contended, in the Constitutional Convention, that * "no lawyer, no civilian would say that *ex post facto* laws are not void of themselves," yet the Convention made assurance doubly sure by prohibiting both Congress and the States from passing bills of attainder or *expost facto* laws.

† No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The crime that strikes at the life of civil government, the evidence required for the conviction of the defendant, and the limit of the punishment of the

* Elliot's Debates, vol. v., p. 462.

† Const., Art. iii., 3-1.

offender are definitely defined by the Constitution. The next thing to having good laws is to have those laws that do exist, plain and well understood. By act of Congress, treason is punished by death, or fine and imprisonment in the discretion of the court; but for engaging in or assisting a rebellion, or insurrection against the United States authority or laws of the United States, the death penalty is not to be inflicted. The tendency of modern legislation is toward the mitigation of punishment.

Upon an attainder of treason, which means a judicial conviction of treason, the traitor himself is punished, yet his friends are not punished by corruption of his blood, whereby he could neither succeed as heir to any lands which might otherwise have come to him by descent, nor could other persons inherit from or through him. The cruelties of English penal laws rose from the implacable hatred of intermingling races, and the audacity of an enterprising half-savage people. Civil wars, religious conflicts, the pitiless cruelty of the higher ranks of society toward the lower, the chafings of human nature against the restraints of inherited condition, the ignorance and lawlessness of the commonalty, and the vices of the nobility, called for a penal code where death was written in every line.

Our Constitution was for a different system of society, and the rigor of English laws was mitigated. Only that part of the English code that was adapted to our situation was held to be in force here, and only those laws re-enacted here that were suitable to our social system.

* No religious test shall ever be required as a qualification to any office or public trust under the United States.

The zealots of religious bigotry and fanaticism ever strove to bend all views into conformity with their own. The Catholic persecuted the Protestant, who in turn, when in power, became persecutor. The history of the Established Church in England is such a story of outrage upon private judgment and religious freedom that our ancestors desired to exclude the Federal government from all connection with religious affairs. The framers of our Constitution, with all their learning and ingenuity, thought that they would accomplish enough if they should establish a system of government which they believed would perpetuate a happy union, and they very wisely left all questions untouched that had no necessary connection with government. To meddle in matters of religion is no part of the business of the general government and would only tend, says Judge Cooley, to revive what Mr. Madison thought was extinguished, "the ambitious hope of making laws for the human mind."

But the Constitution was not definite enough and the very first clause of the first amendment restrains Congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof. Thus the beneficence of the Federal government—like the air we breathe—is enjoyed by every liberty-loving man, whether he be white or black, Christian or infidel. The Providence that rules the affairs of men is wiser than the ambition of spiritual pride or the

* Art. vi.

intolerance of sects. "In matters of religion," says Locke, "every man, must know, believe and give an account for himself." Every step that government takes in religious affairs is that much of a trespass upon the sacred domain of private judgment and individual conscience. The Federal Constitution has not yet made the slighest trespass.

* The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

Individual rights are thus protected against a possible abuse of State power. Although the courts refuse to define what a citizen is entitled to by this guarantee —preferring to decide each case as it comes up—it is well known what are some of the privileges and immunities of citizens. A citizen of another State is by the Constitution entitled to such fundmental rights as protection by the government, the enjoyment of life and liberty with the right to acquire and possess and transfer property, free passage through and residence in another State, to institute and maintain actions of every kind in the State courts, the payment of taxes on an equality with the citizens of the taxing States. With the definition of citizenship given by the Fourteenth amendment and the additional protection to citizens of the United States by the prohibitions on the States of making or enforcing any law which shall abridge the privileges or immunities of citizens, the individual has thus a general citizenship in all the States and the Federal courts can inquire into the legal-

* Art. iv., 2.

ity of every legislative enactment that seems to abridge the privileges or immunities of American citizens.

Thus have I noticed provisions in the nature of a Bill of Rights in the Constitution itself—referring to only two or three of the amendments. The Constitution itself, probably, could not have been adopted had not the people believed that the amendments recommended by so many of the States would soon be adopted and made part of the Constitution. May our people ever be suspicious of power and jealous of their rights.

CHAPTER VIII.

VIII.—BILL OF RIGHTS—CONTINUED.

The construction that is given to the First amendment is that Congress cannot take measures in advance to prevent the speaking or publication of any sentiment. It can pass laws to punish slander or libel, but it cannot require the writer to submit his sentiments to another for approval previous to publication.

Men are responsible for the bad use of words just as they are for the bad use of a gun. "Take away responsibility," says Laboulaye, "and liberty becomes the right of every man to do as his caprice dictates, which is the exact definition of tyranny. The only difference between tyranny and liberty is that tyranny is not responsible for its acts, and liberty carries in its train responsibility."*

"The greatest of all our liberties," says May, "is the liberty of opinion. When the art of printing had developed thought and multiplied the means of discussion, the press was subjected throughout Europe to a rigorous censorship. First the church attempted to prescribe the bounds of human thought and knowledge, and next the State assumed the same presumptuous office. No writings were suffered to be published without the *imprimatur* of the licenser, and the print-

* Const. U. S., vol. iii., p. 539.

ing of unlicensed works was visited with the severest punishments.

"After the Reformation in England, the Crown assumed the right which the church had previously exercised of prohibiting the printing of all works, 'but such as should first be seen and allowed.' The Censorship of the press became part of the prerogative, and printing was further restrained by patents and monopolies. Elizabeth interdicted printing save in London, Oxford and Cambridge."*

Under the Stuarts, political discussion was silenced by the licenser, the Star Chamber, the dungeon, the pillory, mutilation and branding. In 1680, the twelve judges under Chief Justice Scroggs declared it to be criminal at common law to publish any public news, whether true or false, without the King's license.

In 1695, the Licensing Act expired and henceforth in England every writing could be freely published.

In 1791, at the time of the adoption of the first ten amendments to the Constitution, the regulation of the practice of the courts in the trial of causes of libel by Mr. Fox's Libel Bill, was agitating the Parliament of England. For nearly a century the English press had been free, but two principles of law had worked great injustice to those indicted for libel.

In the first place, a publisher in England until 1843, was held criminally answerable for the acts of his servants—the fact of publication having been held sufficient proof of the guilt of the publisher.

* Const. History, vol. ii., pp. 101 and 103.

In the second place, the question whether the writing were a libel or not was held to be a question for the court alone, the jury could only decide on the fact of publication. This was held to be the law of England until 1792. While the mere opinion of one man could fix the question of intention, malice, sedition, or criminal nature of a writing, the liberty of the press was a mere shadow, and the only difficulty in punishing a Junius was in the finding of him.

Thus it took a contest of many generations to free the English press from governmental dictation, and now while no previous restraint can be imposed upon a writer, still men discuss with earnestness concerning what laws are most fit to restrain and punish slanderous words and a libelous press.

Every man has a right to freely utter and publish whatever he may please, except so far as such publications from their blaspheny, obscenity or scandalous character may be a public offense; or by their falsehood or malice they may injuriously affect the standing, reputation or pecuniary interest of individuals.

With free speech and press came of necessity the right of assembly and petition for redress of grievances. They are but the public and general use of the right to speak and write upon questions of common interest.

The Second, Third and Fourth amendments prevent the enactment of laws that might abridge the sacred right of self-defense or subject the property of a citizen to wanton violence.

It is a legacy of English law that every man's house is his castle, and to provide for the security of the people in their persons, houses, papers and effects

against unreasonable searches and seizures is but the re-enactment of a common law principle that runneth back so far that the memory of man runneth not to the contrary.

The independence and security of the people of a Republic are guaranteed by the efficiency of its militia; or, at least, by the ability and willingness of the people to vindicate, if needs be, by force their demands. The fear of a standing army pervaded the minds of our ancestors, and from the days of Tacitus, a large standing army and the heavy taxes needed to support it, have been odious to the free and enlightened citizens of every nation.

The history of "general warrants" carries us back to the days of violent Kings and arbitrary arrests. The judges of the King's Bench, however, in 1763, put an end to warrants that authorized the arrest of all suspected persons, by declaring that the common law requires that the offender and his supposed crime must be named in the warrant and the time and place of his offense described with reasonable certainty.

The Alien and Sedition law of 1798, authorized the President to order all such aliens as he should judge dangerous to the peace and safety of the United States government, or all such as he had reasonable ground to suspect of treasonable conduct against the government, to depart out of the United States or be imprisoned. That law authorized the President to drive men into exile or to imprison them, not after a jury trial but upon suspicion, and justly was it viewed with hostility by the Democracy of the early days of the Republic.

An officer who makes an illegal arrest is a trespasser and liable for damages in a civil suit therefor, while for a person illegally confined in prison the writ of *Habeas corpus* to inquire into his imprisonment, enables him to secure a speedy relief.

The Fifth, Sixth and Eighth amendments chiefly regulate criminal prosecutions and all speak in behalf of the defendant.

English criminal law grew up by a gradual mitigation of rigorous proceedings against the accused. It is only in recent times that the defendant, for a crime of greater magnitude than that of a misdemeanor, has been permitted to have counsel for his assistance.

To compel a man by torture or force to commit perjury or convict himself is humanely forbidden by our fundamental law. True, the cases of some petty criminals against the United States government need not come before a grand jury, but in whatever way a man is deprived of life, liberty or property, it must be, by due process of law, by some general and well known process, by some publicly recognized method.

The policy of the law has become so mild toward defendants that a man is not held to be twice put in jeopardy of life or limb, if after conviction he receives a new trial, and even *ex post facto* laws may be passed by Congress, if they are for the benefit of the accused. The strictness, too, with which the courts construe penal statutes gives every possible advantage to the accused.

Private property is not to be taken for public use, by the Federal government, without just compensation. The compensation to the citizen for the taxes

taken from him is the security afforded him by the government; when property is taken by the right of eminent domain, the individual who has been deprived of more than his share for the common good, is compensated.

"There are occasions," said Chief Justice Taney, * "when private property may lawfully be taken or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may take private property for public use. The government is bound then to make full compensation to the owner, and the officer is not a trespasser nor individually liable. But the danger must be immediate and impending, and the necessity urgent for the public service."

The nation, however, as a supreme political society, cannot be sued and is only morally bound to make compensation. The officer of government who takes private property without legal justification, is individually responsible.

Even the moral responsibility of the government for the destruction of property, which is compelled by some *over-ruling necessity*, is very doubtful. † The pulling down of houses in time of peace to prevent the spread of fire, or the seizure of private provisions for the army in the time of war, are instances of that *over-ruling necessity*, where the natural right of self-defense comes in and the government seems not even morally bound to make compensation. Such, at least, has been the policy of the government of late years.

* 13 Howard, 115.

† See Wm. Lawrence's Articles in *The American Law Register* for 1874.

The case of the Justices against * Murry is a late adjudication on the Seventh amendment. Murry, a United States marshal, had been tried on a charge of assault and battery and false imprisonment, and the jury in a State court found a verdict against him. Under an Act of Congress the whole case was attempted to be brought before the United States Circuit Court of the Southern District of New York, for a retrial.

The court there held that the Act of Congress causing a retrial of a fact in a United States court after one trial by a jury in a State court, was forbidden by the Constitution and void.

The court in which the case had been tried might have granted a new trial or an appellate court might have awarded a new trial by the court where he had been first tried, but the case could not be removed to a United States court for a new jury trial.

The Supreme Court has held † that the provisions of the Fifth amendment apply to all cases where a second trial or second punishment is attempted to be inflicted for the same offense by a Federal judicial proceeding.

Moreover, the Seventh amendment compels the Federal courts to proceed according to the rules of the common law. "There is no more sacred duty of a court," said Mr. J. Miller, ‡ "than to maintain unimpaired those securities for the personal rights of the individual which have secured for ages the sanction of the jurist and the statesman, and in such cases no narrow or illiberal construction should be given to the

* 9 Wallace, 274, by Mr. Justice Nelson.

† *Ex parte* Lange, Oct. Term, 1873.

‡ *Ex parte* Lange. *Pittsburgh Legal Journal*, 1874.

words of a fundamental law in which they are embodied." By the principles of the common law, when a second trial is asked by the defendant for cause, or if the jury fail to agree, a new trial may be had.

The value of the additions to the Constitution, which guard the rights of the accused, are fully appreciated only when we remember the cruelty of State prosecutions previous to the present century. The recollection of the sending of men from America to England for trial probably called forth the provision that the jury shall belong to the State and district wherein the crime shall have been committed.

The privilege of cross-examining the prosecuting witnesses is a valuable aid in the suppression of perjured informers. That the State could so long employ the ablest lawyers in the Kingdom and forbid the defendant the aid of learned counsel, is a sad reflection on the justice of English laws.

The Ninth and Tenth amendments define the nature of the powers delegated to the Federal government and indicate that only a few of the things that the general government cannot do have been mentioned in the limitations in the Constitution.

The absolute, express prohibitions upon the States in the United States Constitution up to the beginning of the late civil war were but nine. Since then six have been added, or seven, if we include the prohibition of slavery. The last three amendments are the results of a contest that has been going on since the foundation of our national union, and they mark the triumph of centralization over State sovereignty. It was a costly triumph; may it result in the preservation of good government and the elevation of humanity.

CHAPTER IX.

IX.—JUDICIAL INTERPRETATION OF THE CONSTITUTION—CHIEF JUSTICES JAY, ELLSWORTH AND MARSHALL.

By means of the Judiciary power, the Federal government enforces its laws by suits against individuals, and secures a peaceable way of deciding legal controversies.

The first judicial decision that excited the country was that of the Supreme Court in the case of Chrisholm's executors against the State of Georgia. Chief Justice Jay, delivering the decision of the court, there held, that a State is suable by individual citizens of another State, that the sovereignty resides in the people, and that the people have given to the Federal courts jurisdiction over suits against a State—a State, said the court, being a mere aggregate of individuals, like any other corporation. The States were alarmed at the danger of being brought before courts sitting in another State, and the Eleventh (xi.) amendment was passed.

The nomination of John Rutledge as Chief Justice not having been confirmed by the Senate, his judicial career lasted but one term.

Oliver Ellsworth, of Connecticut, the third Chief Justice of the United States, assisted to frame the Constitution and to draw up the Act of 1789, which

? Naturalization?

organized the Federal Judiciary. He was familiar with the country's history, and a great statesman as well as judge; not so extreme a Federalist as Jay, nor was he a mere Jeffersonian Republican. In a decision, while presiding in the Circuit Court in North Carolina, he maintained that our government is partly *National* and partly *Federal*, and denied the validity of a State law confiscating debts due British creditors, while a United States treaty permitted the debt to be collected.

The case of Ware against Hylton, or the British debt case, was first tried in Richmond in 1793. The question was whether the treaty of peace, which provided that creditors on either side should meet with no *lawful impediment* to the recovery of the full value of all *bona fide* debts theretofore contracted—whether that treaty revived the debts which had been sequestered by Virginia during the war. The case was argued by John Marshall, Patrick Henry, Campbell and Innis. Upon different occasions, the same question came before Justices Jay, Cushing and Ellsworth, who held that treaties of the United States are the supreme laws of the land, and that when State enactments sequestrating or confiscating foreign debts are forbidden by the treaty, the State enactments must yield to the treaty.

Chief Justice John Marshall took his seat upon the bench of the Supreme Court at the February term, 1801. He had to lay the very foundation of Federal jurisprudence, and he was peculiarly fitted for the work. Trained in the school of the Revolution, having imperiled his life as a soldier, he was a patriot

of the purest type. Devoted to his native State, Virginia, he loved the nation more, and few men in our history have done this land so much honor. As a man, he was one of the plainest of citizens, kind-hearted, generous, of real republican simplicity, noble, brave and true. The greatest judge who has adorned the annals of our bench, he was the peer of Hale or Mansfield.

One of the first constitutional questions that came before Chief Justice Marshall was that involved in the case of Marbury against Madison. Mr. Adams, before the expiration of his term of office, nominated Marbury to the Senate as a Justice of the Peace for the District of Columbia. The Senate approved the nomination. A commission was drawn up, signed by the President and sealed with the United States seal, but not delivered. Mr. Jefferson succeeded to the Presidency, and refused to deliver the commission. A *mandamus* was then moved for, commanding Mr. Madison, the Secretary of State, to deliver it. The question then arose, "Had Congress power to pass an act which authorized the Supreme Court to issue writs of *mandamus* to United States officers?" Congress had passed such an act, but the Supreme Court held that the Constitution limited the original jurisdiction of the Supreme Court to certain cases, and Congress had thus enlarged its original jurisdiction; hence the unconstitutional act of Congress is void. The *mandamus* was refused. The question, whether an act repugnant to the Constitution can become the law of the land, was forever settled in the negative. Marshall's decision was a perfect demonstration.*

* 6 Cranch, 87.

In the case of Fletcher against Peck, the Supreme Court decided that an act of the legislature of Georgia impaired the obligation of contracts, hence the act was repugnant to the United States Constitution and void. Many cases have been decided by the Supreme Court regardless of legislative enactments which that court deemed contrary to the Constitution of the United States.*

The great case of Dartmouth College against Woodward, established the principle that a grant of corporate powers is a contract, the obligation of which the States are inhibited to impair.

In 1816, the New Hampshire Legislature amended the College charter, but the trustees refused to accept the amendments. The State courts supported the usurpation of Mr. Woodward, and the College appealed to the Supreme Court. Mr. Webster and Mr. Hopkinson appeared for the College, Attorney-General Wirt and Mr. Holmes for Woodward. Mr. Webster's speech in behalf of his *Alma Mater* marks an epoch in the history of forensic eloquence. It was not only great as a judicial argument, but his spontaneous appeal to the feelings in that speech will probably live as long as any words that he ever spoke. "† After four hours of clear, forcible reasoning, Webster stood for some moments silent before the court, while every eye was fixed upon him. At length, addressing Chief Justice Marshall, he proceeded thus: This, sir, is my case. It is the case not merely of that humble institution—it is the case of every college in our land. It

* 4 Wheaton, 518.

† Lives of the Chief Justices, by Flander, vol. ii., p. 445.

is more. It is the case of every eleemosynary institution throughout our country—of all those great charities founded by the piety of our ancestry to alleviate human misery and scatter blessings along the pathway of life. It is more. It is in some sense the case of every man among us who has property of which he may be stripped, for the question is simply this, 'Shall our State legislatures be allowed to take that which is not their own, to turn it from its original use and apply it to such ends or purposes as they, in their discretions, shall see fit?' Sir, you may destroy this little institution, it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work. You must extinguish, one after another, all those great lights of science which for more than a century have thrown their radiance over our land! It is, sir, as I have said, a small college, and yet there are those who love it. Sir, I know not how others may feel; but for myself, when I see my *Alma Mater* surrounded, like Cæsar in the Senate House, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me and say, *et tu quoque, mi fili*, and thou, too, my son." The court room was moved to tears, for Webster was too noble a soul not to be filled with emotion himself when defending the school at which he studied, and too great an orator to feebly present his cause.

In the same year, 1818, the great case of McCullock against the State of Maryland,* came before the Su-

* 4 Wheaton, 316.

preme Court. The United States Bank established a branch in Baltimore, whose cashier, Mr. McCullock, was sued by the State for taxes. The State courts deciding against the bank, the case was carried to the Supreme Court. The Hon. Theophilus Parsons thinks that Chief Justice Marshall's opinion in that case—in which the court concurred—is the finest specimen of judicial logic known to history. It does not detract from a judge who for thirty-five years sat upon the supreme bench, loved and admired by all, to say that his decision was aided by the speeches of Wirt, Webster and Wm. Pinckney, who was one of the greatest lawyers of the present century.

In that case, the court held that if the State of Maryland could tax the United States Bank it could destroy it; that Congress, having control of the purse and sword of the nation, was authorized to pass all laws *necessary* and *proper* for the exercise of its powers. In a word, the decision was that the United States Bank was constitutionally established, and that a State could not exercise a power that might destroy a National institution. The Bank did not pay the tax.

In the case of Cohens against the State of Virginia,* it was held that the Supreme Court could exercise jurisdiction when only one of the parties to the suit was a State, the other a citizen of that State; and, in the exercise of its appelate jurisdiction, it could revise the judgment of a State court in a case arising under the laws, treaties and Constitution of the United States.

* 6 Wheaton, 264.

The city of Washington, by authority of Congress, established a lottery. Cohen was indicted at Norfolk, Virginia, for selling lottery tickets, contrary to the State law. In defense, he plead the act of Congress permitting the lottery, but the Supreme Court held, upon appeal to it, that the State law must prevail. The argument of the court, by which it maintained its jurisdiction of the case, is of most importance: "We think," said Marshall, "a case arising under the Constitution, or laws of the United States, is cognizable in the courts of the Union whoever may be the parties to that case. The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be at any time arrested by the will of one of its members. Each member will possess a veto on the will of the whole. These States are members of one great empire—for some purposes sovereign, for some purposes subordinate. * * * The judicial department can decide on the validity of the Constitution or law of a State if it be repugnant to the Constitution or law of the United States. Is it unreasonable that it should be also empowered to decide on the judgment of a State tribunal enforcing an unconstitutional law? The words of the United States Constitution must prevail."*

In the case of Osborn † against the United States Bank, Marshall probably made one of his most liberal

* Lives of Chief Justices, by Flanders, vol. ii., p. 454.

† 9 Wheaton, 738; 12 Wheaton, 419.

decisions. He there held that unless a State were named as defendant on the record, it could not cite the Eleventh amendment to bar the jurisdiction of the courts of the Union. Thus the courts of the Union have jurisdiction where the State is indirectly a party in consequence of her agents acting by her order and substituted in her place. Otherwise, says Marshall, the agents of the State may inhibit the work of the mail carrier, the collector, the marshal, the recruiting officer, and the Federal courts must submit while the agents of the State obstruct the important work of the nation.

The State of Maryland attempted to make Brown,* an importer of foreign articles, take out a State license before selling a bale or package so imported. Brown refused to take out the license and appealed to the Supreme Court, which held that, while in the original form or package in which the goods were imported, a tax upon them is too plainly a duty on imports to escape the prohibition in the Constitution. The State law was not enforced.

The application of steam to the navigation of our rivers made them more valuable. New York granted to Robt. R. Livingston and Robert Fulton the exclusive privilege of navigating her waters by steamboats. They sold part of their waters to the defendant in the great case of Gibbons against Ogden.† Gibbons claimed the right to navigate the waters of New York under the laws of Congress, but the New York courts

* Thurlow *vs.* Mass., Fletcher *vs.* R. I., Pierce *vs* N. H.; 5 Howard, 504.

† 9 Wheaton, pp. 1–240.

deciding in favor of Ogden's exclusive right, Gibbons appealed to the United States Supreme Court.

That court held that the congressional powers to regulate commerce includes the regulation of navigation, and that the laws of New York were held to conflict with the laws of Congress, under which Gibbons held his coasting license. Congress has the *exclusive* right to regulate commerce in all its forms on all the navigable waters of the United States without any monopoly, restraint or interference created by State legislation, unless that State legislation affects only different parts of the same State and extends to no other State.*

But soon came the days of Chief Justice Taney, who —Federalist as he was—favored a strict construction of the powers granted to the national government, and permitted a New York statute to require the master of every vessel upon arriving in the port of New York, to report in writing respecting his passengers, within twenty-four hours of his arrival. The State was thus enabled to tax the passengers. "This," says Taney, "was not a regulation of commerce, but a regulation of police, *persons* not being the subject of commerce, not being imported goods, the States may tax them."†

The same question arose about ten years after Chief Justice Taney's first decision on the power of Congress to regulate commerce and then (1849) the majority of the court sustained Marshall's opinion in the case of Gibbons against Ogden, and Taney's opinion was merely one of dissent.

* Const., Art. i., sec. 8.—"Among the several States."

† 7 Howard.

Other decisions in the days of Taney almost succeeded in placing the ban of uncertainty upon all judicial interpretation of the Constitution.

In the case of Craig against the State of Missouri,* an act of that State establishing loan offices and authorizing the issue of *certificates* of stock, receivable in discharge of taxes or debts due to the State, was declared repugnant to that clause of the Constitution which prohibits the States from emitting bills of credit. Although called certificates of stock, they were held by the court to be the kind of circulating paper which a State was forbidden to issue. But when Kentucky (Briscoe *vs.* Bank of the State of Kentucky) issued paper from its bank, established "in the name and behalf of the Commonwealth of Kentucky," Chief Justice Taney and the majority of the court held that the States were only prohibited from emitting such paper as was denominated bills of credit before and at the time of the adoption of the Constitution. That same Kentucky case had been argued before Chief Justice Marshall, and he and a majority of the court were of opinion that the act was unconstitutional and void. Marshall would prohibit the States from uttering any paper in the nature of bills of credit; Taney would permit them to issue almost any kind of paper, so it was not called a bill of credit. Marshall prohibited the thing, Taney the name.

The Charles River Bridge held its franchises under the Massachusetts Legislature. It held that, as a

* 4 Peters, 411.

corporation, it had in perpetuity the exclusive right to erect and maintain a bridge over the Charles river, and receive tolls, and that the act of the Legislature of Massachusetts which authorized the erection of the Warren bridge—a free bridge over the same river—impaired the implied contract contained in the charter of the Charles River Bridge, not to authorize another such structure. Did the charter of this new bridge impair this implied contract?

Chief Justice Taney held that there was no such implied contract, that public grants must be construed strictly, and that nothing passes from the States by implication, that what they do not give away they reserve to themselves, and therefore the charter of the Warren bridge was constitutional, since no contract had been impaired by granting it.

The decisions of the Supreme Court in the cases that came before it a few years after the death of Marshall, created alarm in the minds of such eminent men as Story and Kent, lest the Judiciary would permit the supremacy of the national government to succumb to the subordinate power of the States and the Constitution itself to become a mere dead letter.

Before the death of Chief Justice Taney, in October, 1864, he perceived that the tribunal in which he presided had become the weakest branch of the government, and that in attempting to resist the tide of popular opinion on the question of slavery, it had become almost impotent even in its appropriate sphere. The present importance of that high tribunal is due to its ability, impartiality and the reverence of the American people for its highest oracle of the law.

CHAPTER X.

X—THE JUDICIARY—CHIEF JUSTICE TANEY.

The decisions of the Supreme Court from 1835 to 1864, upon constitutional questions, are numerous and important. Although Chief Justice Taney's opinion was often one of dissent, probably the best way to trace the action of the court, would be to examine his opinions as a judge.

Appointed by President Jackson, of whom he was a warm political and personal friend, Taney had a vigorous, independent mind, stored with legal and political knowledge, but with little else. On account of his eminence as a lawyer and his devotion to duty as he saw it, his opinions as a judge will always be entitled to consideration.

When an impartial history of his life shall have been written, it may be seen that his faults were few, but that misfortune had placed him in opposition to an overwhelming popular sentiment. Descended from slave-holding ancestors, he had little sympathy with the Abolitionists, and for his opinions upon questions that involved the rights of the negro, he has been most bitterly maligned. A devout Roman Catholic in religion, in his private life, he was kind, loving and happy, an illustrious example of a zealous, pious man.

A Federalist, with Republican friends and associates, few of his opinions favored liberal construction, and his influence on the court tended toward national disintegration. *

One of the earlier cases that came before Chief Justice Taney, where constitutional questions were involved, was the suit of Rhode Island against Massachusetts for the recovery of political sovereignty and jurisdiction over about one hundred square miles of territory, with about five thousand inhabitants. Massachusetts moved to dismiss the bill in equity against her, because (1) the Supreme Court had not jurisdiction of the case, (2) the defendant was a sovereign State, and (3) because by a judicial decree sovereignty and jurisdiction cannot be recovered. The case was ten years in court, and in 1846 the court held that Rhode Island did not prove a mistake in the boundary line, and the rightful possession of Massachusetts for two centuries, could not now be disturbed. During the whole controversy Taney held that the Supreme Court had no jurisdiction over questions involving political rights—*that* being a subject for the control of Congress. The decision was of great importance to the majority in Congress in the recent days of Reconstruction.

The corporation cases † established the principle that the corporations of one State, created by statute, within its territorial limits, are permitted by the comity of nations to make contracts in the other States and sue in their courts. "The States," said

* Tyler's Life of Taney.

† Bank of Augusta *vs.* Earle, 1839.

Taney, "have adopted toward each other the laws of comity in their fullest extent." In 1847, * this principle shaped Taney's decision when he held that a discharge of a debtor by a State insolvent law, was a discharge of a debt due to a citizen of another State, although Marshall had decided otherwise.

What the comity of nations effected, in Taney's opinion, now is accomplished by the United States bankrupt law, which aims at a just and equitable discharge of the unfortunate debtor.

In 1841, came before the Supreme Court the case of Prigg† against the State of Pennsylvania, in which arose the question of the validity of State laws prohibiting the taking and carrying away of a negro or mulatto by force and violence out of the State. The agitation that resulted in the abolition of slavery had begun, and the legality of the State law which Prigg had violated was opposed by the friends of slavery and supported by eloquent counsel in behalf of the Commonwealth. Mr. Justice Story denied the validity of the State law on the ground that the Constitution places the remedy for fugitives from labor *exclusively* in Congress. Taney went further and held that the States had power also to pass laws to aid in capturing fugitives.

Here lies a fundamental principle of construction with Taney, and it has prevailed. He held that the States could aid the Federal government. It is now settled that where State legislation is not in conflict with Federal laws on the same subject nor inconsistent

* Cook *vs.* Moffat.

† Prigg *vs.* Penna., 16 Peters, 539.

with Federal legislation, the States can pass laws on subjects of national legislation. The States are sovereign in every thing that has not been taken away from them.

In 1840, came before the Supreme Court the *Habeas corpus* case known as Holmes *vs.* Jennison.* Governor Jennison, of Vermont, at the instance of the Canadian government, commanded a sheriff to arrest Holmes and take him to Canada. Holmes sued out a writ of *Habeas corpus* from the Supreme Court of Vermont, which held that the Governor had authority to issue the warrant. After an argument that went into the questions of foreign intercourse, State and national jurisdiction, the majority of the court held that the Supreme Court of Vermont had jurisdiction. Taney,† however, held that foreign intercourse belongs by express grant to the Federal government and that the States have no jurisdiction in foreign affairs.

In January, 1847, there came from Massachusetts, Rhode Island and New Hampshire, what were known as the license cases, ‡ in which it was decided that the States can regulate or prohibit the retail of wines and spirits which Congress has authorized to be imported from foreign countries. "But," says Taney, "the States could not obstruct the importation or prohibit the sale in the original cask in the hands of the importer. When an import becomes mixed with the general property of the State, it is beyond the power of Congress in regulating commerce, and within the

* (Story), McLean, Wayne, Taney.

† 14 Peters.

‡ 5 Howard.

taxing power of the State. Thus the courts determine where Federal jurisdiction ends and State begins.

In the license cases, and also the passenger cases * of 1849, Taney applied his theory of construction, that our political system is a co-operative one on the part of the States in aid of the Federal government.

The passenger cases were argued several times for the benefit of the court, which finally by a majority, held that the power to regulate commerce is *exclusively* vested in Congress, and that a tax upon passengers arriving in a port, by the State in which they arrive, is a regulation of commerce—both of which propositions Taney denied.

The passenger cases occupy 290 pages in the seventh of Howard's Reports, and contain a thorough discussion of the powers of Congress and the rights of the State in regard to commerce. "A tax upon passengers arriving in vessels," said Mr. Justice Grier, "prohibits the emigration of foreigners to other States, taxes commerce and is not a police regulation of the State;" and thus New York and Massachusetts had to submit to the superior power of Congress.

In 1849, came before the Supreme Court the case of Luther against Borden,† in which an attempt was made to have that court decide which one of the two rival governments in Rhode Island was the legitimate one. Although the case itself was the justification of an ordinary trespass, yet the remote questions involved the great problem of changing a form of government.

* 7 Howard.

† 7 Howard.

While the court declared that political questions are to be decided by the political department of the government, it pointed out the three recognized methods of changing a form of government as (1) the change by *revolution*, (2) by the method pointed out in the Constitution itself, (3) and by a law authorizing the change in a form of government.

Whatever might be the opinion of individual members of the court, the Constitution * empowers Congress to decide what government is the established one in the State.

"The high power," said Taney, "has been conferred on this court of passing judgment on the acts of the State sovereignties, and upon the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. We pass not into discussions that belong to other forums."

The political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, or of the United States, and the judicial power has followed its decision.

In 1851, the case of the Genesee Chief called forth from Taney probably the most liberal decision of his judicial career. By the law of England, maritime jurisdiction extended only over tide water. In 1825, our Supreme Court had decided that the maritime jurisdiction of the Federal courts, was also limited by the ebb and flow of the tide. However, Congress in

* Art. iv., sec. 4.

1845 passed an act extending the admiralty jurisdiction over the lakes and connecting navigable waters of the nation. The question then arose, was that Act authorized by the Constitution. If not, then the Federal courts had no jurisdiction over a suit for damages against the Genesee Chief, and the Act of Congress attempting to give the Federal courts admiralty jurisdiction over Lake Ontario and our great rivers was a nullity. "It is evident," said the Chief Justice, "that a definition that would at this day limit public rivers in this country to tide water rivers is inadmissible. We have thousands of miles of public navigable waters in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The decision limiting admiralty jurisdiction to tide water was founded in error and it is not our duty to perpetuate it."

On the 6th of March, 1857, Chief Justice Taney gave the decision of the Supreme Court in the case of Scott * against Sanford, known as the Dred Scott case. That case is so intimately connected with the last three amendments to the Constitution, and formed so marked an epoch in the history of that court that it must be noticed.

† "The great question involved in the case was *whether* it be competent for the Congress of the United States, directly or indirectly, to exclude slavery from the territories of the Union. The Supreme Court

* 19 Howard.

† Tyler's Life of Taney, p. 360.

decided that it is not. Six of the eight judges assenting: McLean and Curtis dissented.

The opinion of the court is based upon the doctrine that when the American colonies were settled, property in African negroes was recognized by the public law of Europe, and that trade in negros as merchandise was regulated by public treaties and by municipal legislation.

England, in 1713, obtained by the treaty of Utrecht the almost entire control of the trade of supplying the American colonies with slaves. The people of England, dissatisfied with the monopoly by a few royal favorites of such a profitable trade, forced Parliament to open it to all the subjects of Britain. The common law of England, or rather the navigation act, placed negroes on the same footing as property, and included them with rum, goods and merchandise. That States of Europe in this phase of public law and national practice introduced slavery into their American colonies, and established property in negroes as recognized by public law, just as slavery on the continent of Europe had always been recognized by the law of nations. That when the Constitution of the United States was formed, negroes were just as much property as any other goods and merchandise.

The Constitution, recognizing and protecting property in slaves, the master had as much right to take his slaves as any other property, into the common territory of the United States held by the government in trust for all citizens; and that as the Missouri Compromise was in violation of this right, it was null and

void. And that negroes, being considered by the Constitution as only property, could not, when freed by their masters, thereby become citizens of the United States.

Thus you can see the grounds upon which Taney held that the negro had no rights which the white man was bound to respect. It was not a personal opinion of the judge, but a statement of how the law stood, and it remained for a great civil war and an amended Constitution to change the law.

not in so many words.

The Dred Scott decision added fuel to the anti-slavery agitation. The State of Wisconsin openly defied the Supreme Court in its attempt to enforce the punishment of Sherman M. Booth, who had been convicted of violating the fugitive slave law of 1850. The Supreme court of Wisconsin on a writ of *Habeas corpus* liberated Booth when imprisoned by a Federal court, and the legislature of that State passed resolutions denying that the United States courts have the exclusive right to determine questions of Federal law.*

Two years after the case of Booth, President Lincoln's first inaugural address (1861) indicated the sentiment that prevailed with the dominant party toward the Supreme Court.

"The candid citizen must confess," said Mr. Lincoln, "that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have

* Page 398 of Tyler's Life of Taney.

ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

With the war, prevailed the maxim that the safety of the people is the highest law, and the venerable Chief Justice files his opinion in the Merryman case. A general in the army had caused the arrest of John Merryman and had him confined in Fort McHenry. Taney issued a writ of *Habeas corpus* to examine into the commitment of Merryman. The commander of the fort refused to deliver up his prisoner, answering that he had been authorized by President Lincoln to suspend the writ of *Habeas corpus.*

The judge files his opinion to the effect that none but Congress can judge that the emergency has arisen when the public safety demands the suspension of that sacred writ; that if such military usurpation is legal, then every citizen holds his life, liberty and property at the will and pleasure of the army officer in whose military district he may chanee to be found.

Since then, the courts have held that even when the writs of *Habeas corpus* is suspended, it issues and the court decides whether the defendant is entitled to the benefit of the writ, when the prisoner has been brought into court.

Little interest need be taken in judicial proceedings during a great civil war, for *inter arma legis silent.* With the return of peace new interests sprung up and new questions for adjudication.

CHAPTER XI.

XI.—THE JUDICIARY—CHIEF JUSTICE CHASE.

Salmon P. Chase was appointed Chief Justice, to preside in a court that had become distinguished in history, and honored by the noted men who had presided in it, as well as by the renowned lawyers who had plead causes before the highest tribunal of the nation. The system of Federal law, too, of which the Supreme Court is the highest exponent, had become pretty well settled, and men were on the bench as judges who by the long period of their judicial lives had become familiar with almost every question for litigation in that court.

The time had gone by for one man to write or dictate the opinion of the court, especially if that man were but fresh from the field of politics, as was Mr. Chase, and henceforth the opinions of the court are more truly the opinions of a number of competent judges than the irresistible conclusions of one profound mind.

The life of Mr. Chase had been passed chiefly in politics, and he had adopted a theory of our Federal government which as judge he did not fail to carry out. As a statesman, he aimed to divorce the Federal government from all connection with slavery, to confine its action within constitutional limits, to uphold the rights of individuals whether black or white, as

well as the rights of the States, and to foster all the great interests of the country.

It is noticeable that upon the new questions that continued to arise under the peculiar circumstances of the civil war and the abolition of slavery, the opinion of the court is generally given by one of the associate judges. It was the custom, in the earlier history of the court, for the Chief Justice to appoint one of the associate justices to deliver the opinion of the court, even when the majority of the judges differed from the Chief Justice upon what the decision of the court should be. It is said that Chief Justices Marshall and Taney took advantage of this privilege, and, while appointing the weakest man of the majority to write the opinion of the court, they themselves wrote the dissenting opinion, which embodied all the force and logic of their peculiar powers to weaken the opinion of the court.

In later times, however, the majority of the court have adopted the plan of choosing whatever judge they wish to write the opinion of the court, and thus the dissenting judges must encounter the opinion of the most competent man of the majority.

Upon the questions that came before the Supreme Court since December 6, 1869, the opinions of the court have generally favored consolidation and the extension of Federal power.

Upon the question of taxation, for example, it has been fully settled that the States cannot tax any of the means used by the Federal government to carry on its affairs, while Congress can tax all the property of citizens and the salaries of State officials. It has been

decided, however, that Congress cannot tax the salary of a State judge,* although it can tax the machinery of the State courts.

One of the most important cases that came before the Supreme Court in the days of Chief Justice Chase was that of *ex parte* Milligan.† It involved the very framework of the government and the fundamental principles of American liberty.

Milligan, a citizen of Indiana, was condemned by a military commission to be hanged for acts of disloyalty to the United States government. The United States Circuit Court of Indiana refused to discharge Milligan on a writ of *Habeas corpus*, and the case was appealed to the Supreme Court.

After a thorough argument and careful consideration, the court decided, among other things, that the guarantee of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace, that while the Federal courts were open for the trial of offences and the redress of grievances, the usages of war could not under the Constitution afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service by a military tribunal for any offense whatever, that even when the privilege of the writ of *Habeas corpus* is suspended, a citizen cannot be tried, convicted or sentenced otherwise than by the ordinary courts of law.

The opinion of the Chief Justice, in which he maintained the power of Congress to create a military

* The Collector *vs.* Way, 11 Wallace, 113.

† 4 Wallace, 3.

commission to try offenders during war, is an example of the extent to which a liberal construction of the war powers contained in the Constitution may go. Happily, the majority of the court did not think that Congress has the power to set aside the courts and try men by a picked set of commissioners.

The case of *ex parte* Milligan defined the three kinds of military jurisdiction known to our government. *Military law* is the acts of Congress providing for the government of the national forces. *Military government* partially supersedes the local law, and is exercised by a military commander under the direction of the President, with the express or implied sanction of Congress. *Martial law* is the will of an individual, becoming the law of a locality where ordinary law no longer secures the public safety and private rights. It is called into exercise by the President or Congress in times of peril.

In the case of *ex parte* Garland,* the prohibition upon Congress, of passing bills of attainder and *ex post facto* laws, were enforced. Congress passed a law preventing attorneys from practising law in the United States courts unless they should have taken what is known as the "iron clad oath." But, said the Supreme Court, the act partakes of the nature of a bill of pains and penalties, and is included in the prohibition against the passage of bills of attainder. The act, too, was held to add a new punishment to that before prescribed for treason, and thus was an *ex post facto* law.

* 4 Wallace, 333.

The Legal Tender cases form an important chapter in the history of the Supreme Court. On the 7th of February, 1870, Chief Justice Chase delivered the opinion of the court in the case of Hepburn * *vs.* Griswold, in which the acts of Congress making notes or bills of credit a legal tender in payment of pre-existing debts, were declared unconstitutional.

The grounds of the opinion were that the words, "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have in the Constitution, a sense equivalent to that of the words "laws not absolutely necessary, indeed but *appropriate*, and the legal tender acts are not a means appropriate, plainly adapted or really calculated to carry into effect express power vested in Congress, but are inconsistent with the spirit of the Constitution and are prohibited by it;" that, prior to the 25th of February, 1862, all contracts for the payment of money not expressly stipulating otherwise, were in legal effect contracts for the payment of coin, and under the Constitution the parties are bound to pay the sums due in coin, notwithstanding the acts of Congress, which make United States notes a legal tender in payment of such debts.

The decision in the case of Hepburn *vs.* Griswold, in which a debt payable in "dollars" was held to be payable in coin, surprised and alarmed many. The very Chief Justice who delivered the opinion had been Secretary of the Treasury when the legal tender acts were passed, but upon the return of peace he

* 8 Wallace, 626.

appears to have given his decision as a judge after the most careful and honest deliberation.

Before the December term of 1870, the President appointed Wm. Strong, of Pennsylvania, and J. P. Bradley, of New Jersey, Associate Judges of the Supreme Court, whereupon two cases * involving the constitutionality of the legal tender acts were ordered to be re-argued.

Mr. Justice Strong, on the 15th of January, 1872 delivered the opinion of the court in which the opinion in the case of Hepburn *vs.* Griswold was over-ruled after an existence of nearly two years.

"We over-rule," † said Mr. Justice Strong, "so much of what was decided in Hepburn *vs.* Griswold as ruled the acts unwarranted by the Constitution, so far as they apply to contracts made before their enactment."

The law is now settled that an Act of Congress making promise-to-pay dollars as legal a tender as coined dollars in payment of pre-existing debts, is a means appropriate and plainly adapted to the exercise of powers expressly granted by the Constitution.

Thus by the resignation of one judge—Mr. Grier—and the appointment of two new ones, the powers of Congress were upheld in its control of the finances of the nation.

The Federal courts have jurisdiction of *all* admiralty and maritime cases, and let us glance at their decisions in such causes. The admiralty law, like equity proceedings, not having its origin in the Eng-

* Knox *vs.* Lee and Parker *vs.* Davis.

† 12 Wallace, 457.

lish common law, does not provide for jury trials, but makes its decrees by the orders of a judge, the facts usually being admitted or found by a commissioner appointed for the purpose. Thus admiralty and maritime rights are settled by the rulings of the courts.

It was not until 1871 that the Supreme Court went so far as to say that the United States District Court has exclusively the power to proceed *in rem*, that is, against the vessel and adjudicate against it as the defendant. "The common law remedies," said Mr. Justice Clifford, * "are not appropriate nor competent to enforce a maritime lien by a proceeding against the vessel." That the State legislatures have authority to create a maritime lien has become the ruling of the Supreme Court, yet the State courts cannot enforce that lien by proceeding *in rem*.

In Mr. Justice Story's day the court held † that the State laws in admiralty affairs should be recognized and enforced by the Federal courts. Thus the Federal courts in time have become exclusive and absolute in the departments in which the Constitution by a liberal construction permits them to have exclusive jurisdiction.‡

The Slaughter-house cases § have called forth the most important recent constitutional decision from the Supreme Court.

The legislature of Louisiana, on the 8th of March, 1869, passed an act granting to a corporation, created

* 11 Wallace, 185; Leon *vs.* Galceron.

† The Gen. Smith.

‡ The Lattawana, 21 Wallace, 558.

§ 16 Wallace, 36; Butchers' Benevolent Assoc'ation of New Orleans *vs.* The Crescent City Live Stock Landing and Slaughter-house Co.

by it, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson and St. Bernard—1,154 square miles of territory, having a population of nearly 300,000, and prohibiting all other persons from building, keeping or having slaughter-houses, landings for cattle, and yards for cattle intended for sale or slaughter within those limits; and authorizing the corporation to exact certain fees and charges for the privileges of landing and slaughtering upon its premises. After the most thorough argument and deliberation it was held that this monopoly which destroyed the business of hundreds of citizens, was not a law that abridged the privileges or immunities of citizens of the United States; that the Parliament of Great Britain and the State legislatures of this country, have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class and has until now never been denied.

The slaughter-house monopoly, in fine, was held to be the exercise of the power of the legislature to make police regulations—a power behind which the State takes shelter to pass many oppressive laws.

Justices Chase, Field, Swayne and Bradley dissented, believing that the Fourteenth amendment, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, authorized the court to declare the act void, and that one of the privileges

and immunities of citizens is to follow whatever lawful employment he chooses.

But the majority of the court held that the history of the last three amendments to the Constitution shows, that they were intended to free the African race, secure and perpetuate that freedom, and protect it from the oppressions of the white men who had been slave owners.

The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the Fourteenth amendment.

What the privileges and immunities of citizens of the United States are which no State can abridge, the court declined to say. It enumerated a few merely by way of example. Such as the right to go to Washington to assert a claim upon the government, * to demand the care and protection of the Federal government, the privilege of the writ of *Habeas corpus*, right to use the navigable waters of the United States, are some of the privileges and immunities of the citizens of the United States. Still less did the court attempt to define the privileges and immunities of the citizens of a State.

The boundaries of State and national jurisdiction form a constant theme for the adjudication of the Supreme Court, and that it may preserve the happy

* 6 Wallace, 36; Crandall *vs.* Nevada.

medium between consolidation on the one side, and the undue independence of the States on the other, is the hope of every good and patriotic citizen.

CHAPTER XII.

XII.—THE JUDICIARY—MORRISON R. WAITE, CHIEF JUSTICE FROM JANUARY 21, 1874, DOWN TO THE PRESENT TIME.

On January 21, 1874, the Hon. Morrison R. Waite, of Ohio, was commissioned to fill the vacancy caused by the death of Chief Justice Chase in 1873.

Of late years, the docket of the Supreme Court has been burdened with cases, and Congress has lessened the number of cases which can be taken there by enlarging the amount of money required to be in controversy to give the court jurisdiction. The power of Congress to order and establish inferior Federal courts and to regulate the appellate jurisdiction of the Supreme Court, has given us the District and Circuit Courts and the Court of Claims. The two former were created by the Judiciary Act of 1789; the latter was called into existence by the circumstances of the war of '61, and has jurisdiction of all claims founded upon any law of Congress, or upon any regulation of the executive department, or upon any contract with the United States, and claims referred to said court by either house of Congress; of set-offs by the government against claimants against it; of relief sought by persons liable to pay money to the United States, and of claims for property destroyed by the government.

The Supreme Court has appellate jurisdiction from these three courts under certain rules. That court is also largely occupied by deciding upon matters brought there from the highest courts of the States, since Congress has enacted that "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right or privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be reexamined and reversed or affirmed in the Supreme Court on a writ of error."

Although in Federal affairs the Supreme Court has this high power, yet the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, are regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. It is enacted, too, that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admirality causes in the dis-

trict and circuit courts, shall conform as near as may be to the practice and pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district or circuit courts are held, any rules of court to the contrary notwithstanding.

The mode of forming juries practiced in each State so far as such mode may be practical by the courts of the United States or the officers thereof, are followed in empannelling juries in Federal causes.

No witness can be excluded from testifying on account of color or interest; but in all other respects the laws of the State in which the court is held shall be the rules of decisions as to the competency of witnesses in the courts of the United States, in trials at common law and in equity and admirality.

It is the settled law of the Federal courts that the Supreme Court of a State is the highest authority upon the construction to be placed upon the statutes of that State. The Federal courts follow the decisions of the State courts upon matters of local legislation and State law. Where the constitution and laws of a State have been construed differently at different times by the highest court of the State, the Supreme Court of the United States adopt the first decisions and reject the last.

All of the recent decisions of the Federal Supreme Court are worthy of study, but let us glance at a few of the most important opinions on constitutional questions.

The city of Topeka,* in Kansas, was authorized by

* Loan Association *vs.* Topeka, 20 Wallace, 655.

the State legislature to issue bonds to aid a manufacturing enterprise in that city. The bonds were sold, and some of them purchased by citizens of Ohio. The city denied its liability, and the suit to recover the value of the bonds reached the Supreme Court, where the powers of the legislature to authorize taxation were discussed at length.

It was held that a statute which authorizes towns to contract debts or other obligations, payable in money, implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided. If there is no power in the legislature which passed such a statute to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute. There is no such thing in the theory of our governments, State and national, as unlimited power in any of its branches. The executive, the legislative and the judicial departments are all of limited and defined powers. There are limitations of such powers, which arise out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Among these is the limitation of the right of taxation, that it can only be used in aid of a public object—an object which is within the purpose for which governments are established. It cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby. The line

which distinguishes the public use for which taxes may be assessed from the private use for which they may not, is not always easy to discern. A statute which authorizes a town to issue its bonds in aid of a manufacturing enterprise of individuals, is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use in the proper sense of that term.

Mrs. Va. Minor, * of Missouri, claimed the right to vote on the grounds that she was a native born free white citizen of the United States, over the age of twenty-one years. The Constitution of Missouri said that every *male* citizen of the United States shall be entited to vote.

Happersett, the Registrar of voters, refused to register her as a lawful voter because she was a woman. The State courts refused to punish the registrar for his refusal, and the case was brought to the Supreme Court when the Chief Justice delivered the unanimous opinion of the court that the Constitution of the United States does not confer the right of suffrage on any one; that the right of suffrage was not necessarily one of the privileges and immunities of citizenship before the adoption of the Fourteenth amendment, and that amendment does not add to those privileges and immunities; that the word citizen is often used to convey the idea of membership in a nation; that the elector or voter holds an office in the State which is distinct from the privileges and immunities of a citizen; and that the office of elector never did

* Minor *vs.* Happersett; 21 Wallace, 162.

embrace the whole body of the citizens of the States.

It has since been held * that citizens are merely members of the political community to which they belong; that there is in our political system a government of each of the several States and a government of the United States; that the rights of a citizen under one government will be different from those he has under the other; that the government of the United States, although, within the scope of its powers, it is supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not placed under its jurisdiction; that the United States Constitution has not conferred the right of suffrage on any one. The right to vote in the States comes from the States.

The powers † of Congress under the Fifteenth amendment may be applied to punish the wrongful refusal to receive the vote of a qualified elector at elections because of his "race, color or previous condition of servitude." The power of Congress to legislate on the subject of voting at State elections rests on the Fifteenth amendment. That amendment does not confer the right of suffrage. It enables Congress to prevent discrimination by the States when State laws discriminate against the citizen on account of "race, color or previous condition of servitude."

The powers of Congress to regulate commerce with foreign nations and among the several States preven ‡ the States from passing laws discriminating against

* United States *vs.* Cruikshank, *et al.*; 2 Otto, 542.

† United States *vs.* Reese, *et al.*; 2 Otto, 214.

‡ Welton *vs.* Missouri; 1 Otto, 275.

the products of other States, and if Congress passes no laws in regard to inter-state commerce, then that commerce is to be free. A license tax required to be paid to the State for the privilege of selling goods imported from another State is virtually a tax upon the goods themselves and a regulation of commerce. A State tax thus discriminating against the goods of another State is void.

A State statute * which imposes a burdensome and almost impossible condition on the ship-master as a pro-requisite to his landing his passengers with an alternative payment of a small sum of money for each one of them, is a tax on the ship owner for the right to land such passengers and in effect on the passengers themselves, since the ship-master makes them pay it in advance as part of their fare. Such a statute is a regulation of commerce, and when applied to foreign passengers is unconstitutional since Congress has the sole power to regulate commerce with foreign nations. The police power of the State will not enable it to tax or prohibit foreign or inter-State commerce.†

The national banks are held to be under the exclusive control of Congress. The right of eminent domain exists in the government of the United States, by which it can take private property ‡ for public uses in any State to enable it to execute the powers conferred upon it by the Constitution. Just compensation

* Henderson *et al.*, *vs.* the Mayor of the City of New York; 2 Otto, 259.

† Chy Lung *vs.* Freeman *et al.*; 2 Otto, 275.

‡ Kohl *et al.*, *vs.* U. S.; 1 Otto, 367.

must be made to the individual, and the property must be taken by due process of law.

The laws of the United States are as much the law of the land in any State as State laws are, and although in their enforcement, exclusive jurisdiction may by Congress be given to the Federal courts, yet where such exclusive jurisdiction is not given or necessarily implied, the State courts may be resorted to.‡ Congress expressly gives the State courts jurisdiction in many Federal affairs, and thus receives the aid of the powers of the States, in the enforcement of its laws.

Standing by its former decisions, the guardian of the Constitution, yet meting out justice to every suitor, the National Judiciary commands the respect and admiration of all good men.

‡ Claflin *vs.* Houseman; 3 Central Law Journal, 803.

APPENDIX.

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.*

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America. [*See* 1 *Wheat.*, 324. 4 *Wheat.*, 403.]

ARTICLE I.

OF THE LEGISLATURE.

SECTION I. All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

OF THE HOUSE OF REPRESENTATIVES.

SEC. II. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

QUALIFICATIONS OF MEMBERS.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

*This Constitution went into operation on the first Wednesday in March, 1789. [5 *Wheat.*, 420.]

APPORTIONMENT OF REPRESENTATIVES AND DIRECT TAXES—CENSUS.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. [*See* 5 *Wheat.*, 317.]

VACANCIES.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

OF THEIR OFFICERS—IMPEACHMENT.

5. The House of Representatives shall choose their Speaker, and other officers, and shall have the sole power of impeachment.

OF THE SENATE.

SEC. III. 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years, and each Senator shall have one vote. [*See* 6 *Wheat.*, 390.]

THEIR CLASSES.

2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class

shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year. And if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

QUALIFICATIONS OF SENATORS.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not when elected be an inhabitant of that State for which he shall be chosen.

OF THE VICE PRESIDENT.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

OF THE OFFICERS OF THE SENATE.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

OF IMPEACHMENT.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment, in cases of impeachment, shall not extend futher than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States; but any party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law.

MANNER OF ELECTING MEMBERS OF CONGRESS.

SEC. IV. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each

State, by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

OF THE MEETINGS OF CONGRESS.

2. Congress shall assemble at least once in every year; and such meetings shall be on the first Monday of December, unless they shall by law appoint a different day.

POWERS OF EACH HOUSE.

SEC. V. 1. Each House shall be the judge of the elections returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

EXPULSION.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member. [*See* 1 *Hall's Am. Law Journal*, 459.]

JOURNALS AND YEAS AND NAYS.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in 6heir judgment, require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

OF ADJOURNMENT.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

COMPENSATION, PRIVILEGES AND INCAPACITIES OF MEMBERS.

SEC. VI. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony and breach of the peace, be

privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

EXCLUSION FROM OFFICE.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

REVENUE BILLS.

SEC. VII. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

MANNER OF PASSING BILLS &C.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it; but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objectlons at large on their journal, and proceed to re-consider it. If, after such re-consideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be re-considered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment prevent its return, in which case it shall not be a law.

ORDERS, RESOLUTIONS AND VOTES.

3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on the question of adjournment), shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

GENERAL POWERS OF CONGRESS.

SEC. VIII. The Congress shall have power:

1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises, shall be uniform throughout the United States. [*See* 5 *Wheaton*, 317].

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes. [*See* 9 *Wheaton*, 1,2. *Hall's Am. L. Journ.*, 255, 272. *Johns.*, 488.]

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States. [*See* 4 *Wheaton*, 122, 193, 209. 2 *Wheaton*, 266 20 *Johns.*, 93.]

5. To coin money, regulate the value thereof, and of foreign coins, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and correct coin of the United States.

7. To establish post offices and post roads.

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and inventions. [*See Wheaton's app.*, *n.* 2, *p.* 13. 7 *Wheaton*, 356.]

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations. [5 *Wheaton*, 184, 153,;76. *Wheaton*, 336.]

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. [8 *Cranch*, 110, 154,]

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years

13. To provide and maintain a navy. [*See* 1 *Mason*, 79, 81. 4 *Binn.*, 487.]

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. [*See* 5 *Wheaton*, 1. 19 *Johns.*, 7.]

16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. [3 *S. & R.*, 169. 5 *Wheaton*, 1. 19 *Johns.*, 7.]

17. To exercise exclusive legislation, in all cases whatsoever over such districts (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings; and—[*See* 2 *Mason*, 60. 5 *Wheaton*, 217, 234. 6 *Wheaton*, 440. *Jour. of Juris.*, 47, 156. 17 *Johns.*, 225.]

18. To make all laws which shall be necessary and proper, for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. [4 *Wheaton*, 313. 6 *Wheaton*, 204.]

LIMITATIONS OF THE POWERS OF CONGRESS.

SEC. IX. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or *ex post facto* law shall be passed. [*See* 3 *Dallas*, 387, 396. 6 *Binn.*, 271.]

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration, hereinbefore directed to be taken. [*See* 5 *Wheaton*, 317. 3 *Dall.*, 171.]

5. No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office or title of any kind whatever, from any king, prince or foreign State.

LIMITATIONS OF THE POWERS OF INDIVIDUAL STATES.

SEC. X. 1. No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. [*See* 8 *Wheat.*, 84, 92, 256, *n.* 464. 5 *Wheat.*, 420. 4 *Wheat.*, 519, 1,209. 6 *Wheat.*, 131. 16 *Johns.*, 233. 13 *Mass.*, 16. 17 *Johns.*, *Ch. R.*, 297. 2 *Cowen*, 626.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships

of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

OF THE PRESIDENT—OF THE EXECUTIVE POWER.

SECTION I. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice President, chosen for the same term, be elected as follows:

MANNER OF ELECTING.

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. [*Altered, see Amendments, Article XII.*]

3. The electors shall meet in their respective States, and vote by ballot, for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, and said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-

thirds of the States, and a majority of all States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose for them, by ballot, the Vice President. [*This clause is altogether altered and supplied by the XIIth amendment, which was adopted in* 1804, *on account of the difficulties that arose at the time of Jefferson's first election to the Presidency.*]

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

WHO MAY BE ELECTED PRESIDENT.

5. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States. [*See also as to the Vice President. See XIIth amendment, post.*]

IN CASE OF REMOVAL, &C., OF THE PRESIDENT, HIS POWERS TO DEVOLVE UPON THE VICE PRESIDENT, &C.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

PRESIDENT'S COMPENSATION.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive, within that period, any other emolument from the United States or any of them.

8. Before he enters on the execution of his office he shall take the following oath or affirmation:

HIS OATH.

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

POWERS AND DUTIES OF THE PRESIDENT.

SEC. II. 1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

OF MAKING TREATIES.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, Judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.

POWER OF APPOINTMENT.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

FURTHER POWERS AND DUTIES.

SEC. III. He shall, from time to time, give to the Congress, information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement be-

tween them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States. [*See* 1 *Cranch*, 137.]

OF IMPEACHMENT.

SEC. IV. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

OF THE JUDICIARY—OF THE JUDICIAL POWER—CONCERNING THE JUDGES.

SEC. I. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive or their services a compensation, which shall not be diminished during their continuance in office. [*See* 7 *Johns.*, *Ch. R.* 303.]

EXTENT OF THE JUDICIAL POWER—THIS CLAUSE ALTERED POSTEA—SEE AMENDMENTS, ART. XI.

SEC. II. The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects. [*See* 4 *Dallas*, 297. 6 *Wheat.*, 264, 405. 2 *Mason*, 472 9 *Wheat.*, 819.]

OF ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT.

2. In all cases affecting ambassadors, or other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make. [5 *Sergt. & R.*, 545. 1 *Binn.*, 438.]

OF TRIALS FOR CRIMES.

3. The trials of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

OF TREASON.

SEC. III. 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. [4 *Cranch App. Note B.*, 470, 126.]

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

OF STATE RECORDS.

SEC. I. Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. [*See* 7 *Cranch*, 481. *Wheat.*, 234. 1 *Peters*, 81, 351. 6 *Wheat.*, 129.]

OF CITIZENSHIP.

SEC. II. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. [*See* 4 *Johns.*, *Ch. R.*, 430.]

OF FUGITIVES FROM JUSTICE.[1]

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime. [*See* 4 *Johns.*, *Ch. R.*, 106.]

OF PERSONS HELD TO SERVICE.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due. [*See* 2 *S. & R.*, 306. 3 *S. & R.*, 4. 5 *S & R.*, 62.]

OF THE ADMISSION OF NEW STATES.

SEC. III. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

OF TERRITORIES.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

OF STATE FORMS OF GOVERNMENT—REPUBLICAN FORM OF GOVERNMENT GUARANTEED TO THE SEVERAL STATES.

SEC. IV. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

ARTICLE V.

OF AMENDMENTS TO THE CONSTITUTION.

Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year eighteen hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

OF PUBLIC DEBT.

SEC. 1 All debts contracted, and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation.

OF THE SUPREME LAW OF THE LAND.

SEC. II. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any States to the contrary notwithstanding.

OF THE CONSTITUTIONAL OATH, AND RELIGIOUS TEST.

SEC. III. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States.

ARTICLE VII.

RATIFICATION OF THE CONSTITUTION.

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution, between the States so ratifying the same. [5 *Wheat.*, 422.]

DONE in the Convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth.

AMENDMENTS.

The following articles proposed by Congress, in addition to and amendments of the Constitution of the United States, having been ratified by the Legislatures of three-fourths of the States, are become a part of the Constitution.

First Congress, First Session, March 5, 1789.

OF THE RIGHT OF CONSCIENCE, FREEDOM OF THE PRESS, &C.

ART. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. [*See* 3 *Yates*, 520.]

OF THE RIGHT TO BEAR ARMS.

ART. II. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

OF QUARTERING TROOPS.

ART. III. No soldier shall in time of peace be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

OF THE RIGHT TO BE SECURE FROM SEARCH, &C.

ART. IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. [2 *Cranch*, 448, 453. 6 *Binn.*, 316.]

OF INDICTMENTS, PUNISHMENTS, &C.

ART. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself; nor to be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation. [18 *Johns.*, 187, 201. 3 *Yeates*, 362. 6 *Binn.* 509. 2 *Dall.*, 312. 2 *Johns.*, *Ch. R.*, 164. 2, *S. & R.*, 382. 6 *Cowan*, 530. 8 *Wend.*, 85. 7 *Pet.*, 243.]

OF TRIAL IN CRIMINAL CASES, AND THE RIGHTS OF A DEFENDANT.

ART. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defence.

OF TRIAL IN CIVIL CASES.

ART. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. [*See* 8 *Wheat.*, 85, 674.]

OF BAIL AND FINES.

ART. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [*See* 20 *Johns.*, 457. 3 *Cowan*, 686.]

OF RIGHTS RESERVED.

ART. IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others, retained by the people.

OF POWERS RESERVED TO THE STATES.

ART. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. [1 *Wheat.*, 325.]

Third Congress, Second Session, December 3, 1793. Adopted 1798.

OF THE JUDICIAL POWER—SEE ART. III., SEC. 2.

ART. XI. The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State. [*See* 6 *Wheat.*, 405. 1 *Pet.*, 110. 7 *Pet.*, 627.]

Eighth Congress, First Session, October 17, 1803.

MANNER OF ELECTING THE PRESIDENT AND VICE PRESIDENT.

ART. XII. The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name, in their ballots, the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and the number of votes for each; which lists they shall sign and certify, and transmit sealed, † to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, ‡ and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed. And if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot, the President; but in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice; and if the House of Representatives shall not choose a President whenever the right of a choice shall devolve upon them, before

† Before the 1st Wednesday in January, by act of Congress, 1st March, 1792.

‡ On the 2d Wednesday in February, by the same act.

the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice President of the United States.

SLAVERY PROHIBITED—13TH AMENDMENT, PASSED 1865.

ART. XIII. SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

14TH AMENDMENT, ADOPTED 1868.

SEC. I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. II. Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; but whenever the right to vote at any election for electors of President and Vice-President, or for United States Representatives in Congress, executive and judicial officers, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,

and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, the basis of representation therein shall be reduced in the proportion which the number of said male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. III. No person shall be a Senator or Representative in Congress, elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; but Congress may by a vote of two-thirds of each House, remove such disability.

SEC. IV. The validity of the public debt of the United States authorized by law, including debts incurred for the payment of pensions and bounties for service in suppressing insurrection or rebellion, shall not be questioned, but neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

SEC. V. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

FIFTEENTH AMENDMENT, PASSED BY THE 40TH CONGRESS. ADOPTED 1870.

ARTICLE XV.

SEC. I. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color or previous condition of servitude.

SEC. II. The Congress shall have power to enforce this article by appropriate legislation.

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